THE
MADRAS LAW JOURNAL.

II] JULY [1942

NOTES OF INDIAN CASES.

KRISHNAN CHETTIAR *v.* AMMALU AMMA, (1941) 2 M.L.J. 472.

This case decides a question of more than passing interest. It holds that if there is a karnavan capable of acting and he has not renounced either directly or by implication he alone can bind the family by his acts and no other member of the tarwad, not even one performing minor acts of management, can alienate tarwad property even if it be for a family necessity. The proposition, if sound, will have far reaching effect and will be liable to be invoked with regard to the acts of junior members of a Mitakshara joint family as well. The text of Brihaspati,[1] which is generally regarded as the foundation of the rules relating to alienation by coparceners states:—"Even one person may conclude a gift, hypothecation or sale of immovable property during a calamity or for the sake of the family or for indispensable religious duties". There is nothing in the text to suggest that the alienating member should have the status of a manager. The purpose of the alienation and not the status of the alienor would seem to be the determining factor. "For where family necessity exists, that necessity rests upon the coparceners as a whole and it is proper to imply a consent of all" of them to that act of the one which such necessity has demanded, *Sahu Ram* v. *Bhup Singh*.[2] The touchstone of authority is necessity and if the alienor has acted as a prudent owner for the benefit of the family, the other members must be bound by his acts, see *Mudit Narayan Singh* v. *Ranglal Singh*.[3] There is also express textual authority:—"Should even a *dependent member* enter into a transaction for the need of the family, the head of the family should not set it aside".[4] It cannot be that an alienation of family property for a justifiable cause cannot bind the family merely because it is made by a junior member. It has in fact been recognised that if the manager or karnavan is acting prejudicially to the interests of the family, a junior member may validly pledge the family credit for protecting the family interests, *Raja of Arakal*

1. Cit. in Mitakshara, Ch.I, S. 1, Cl. 28.
2. (1917) I.L.R. 39 All. 437, 443 (P.C.).
3. (1902) I.L.R. 29 Cal. 797.
4. Brihaspati cited in the Viramitrodaya.

v. *Churia Kunhi Kannan.*[1] Likewise a junior member who had been suffered to deal with the family property as if the power of the karta had gone has been held competent to bind by his acts the other members of the family, *Mudit Narayan Singh* v. *Ranglal Singh.*[2] So also even where there is a manager if a junior member had been put in charge of a family business it has been recognised that in regard to that business and for its purposes, he can validly borrow so as to bind the family, to the extent necessary for the proper conduct of the business of which he is in charge, see *Sheo Pershad Singh* v. *Saheb Lal,*[3] *Ramakrishna Mudaliar* v. *Manikka Mudaliar.*[4] No doubt to allow any and every junior member irrespective of his credentials to alienate family property ostensibly on the ground of family necessity may cause inextricable confusion in the joint family affairs and cut at the powers of the manager and afford scope for considerable litigation. That, however, can be no reason why in a case where necessity stands proved and the manager could not easily be got at, a junior member shall not have the power to bind by his acts the other members. To suggest that before a junior member can act, there should have been an abdication by the manager either expressly or by implication, irrespective of need or urgency, is to put the matter rather widely and is not warranted by the authorities.

KANAKARATNAM *v.* NARASIMHA RAO, (1941) 2 M.L.J. 803 (F.B.).

This is a Full Bench decision holding that the motive of a widow in adopting can be ignored where she possesses authority to adopt. The point would have been bereft of importance but for some tortuous language employed in early rulings of the Privy Council which became the subject of conflicting interpretations. It is indisputable that according to the shastras adoption secures spiritual benefit. It is equally indisputable that where the adopter is a male his motive is irrelevant, *Raja Makund Das* v. *Sri Jagannath Jenamoni.*[5] It is also the law that the underlying motive cannot be examined where a widow possessing her husband's authorisation adopts. Is there then any reason why the case of a widow adopting with the consent of her husband's sapindas should stand on a different footing? Considering that adoption is only a method by which a married couple can have a child it seems incongruous that a Court of law should concern itself with the underlying motive and question whether it was caprice or corruption, see *Krishnayya Rao* v. *Raja of Pittapur.*[6] As was tersely put by Jackson, J., "if an adoption is regarded as a form of birth the logical conclusion would seem to be . . . that the widow's motive in making an adoption is no more material than a wife's motive in having a baby," *Murahari Brahma Sastri* v. *Sumitramma.*[7]

1. (1915) 29 M.L.J. 632.
2. (1902) I.L.R. 29 Cal. 797.
3. (1892) I.L.R. 20 Cal. 453.
4. (1937) 1 M.L.J. 587, 594.
5. (1923) I.L.R. 2 Pat. 469.
6. (1928) 55 M.L.J. 894: I.L.R. 51 Mad. 893, 950 (F.B.).
7. (1933) 66 M.L.J. 577: I.L.R. 57 Mad. 411, 426.

Religious benefit being caused to the husband by the adoption any discussion of the widow's motives would *prima facie* be irrelevant. The test should always be objective only, not what weighed with the adopter but what its effect will be with reference to the deceased husband. In some cases the facts may be such as to justify the Court in presuming that bad motives had influence in the widow's mind, but who can ever say that she was not also influenced by good motives, *Ramachandra* v. *Mulji Nanabhai*.[1] Where the motives are of a mixed character the adoption should not be held invalid, *Mahableshwar* v. *Durgabai*.[2] In fact no widow's adoption can stand scrutiny if her motives are important, *Anne Brahmayya* v. *Chelasami Ratayya*.[3] In the *Ramnad case*,[4] however, the Judicial Committee had observed that where a widow seeks to adopt with the consent of her husband's sapindas, there should be such evidence of the assent of the kinsmen as suffices to show "that the act is done by the widow in the proper and *bona fide* performance of a religious duty and neither capriciously nor from corrupt motives". In *Sri Virada Pratapa Raghunadha Deo* v. *Sri Brozo Kishore Patta Deo*,[5] it was further stated: "It may be the duty of a Court of Justice to consider the religious duty of adopting a son as the essential foundation of the law of adoption. . . . But it is impossible not to see that there are grave social objections to making the succession of property . . . dependent on the caprice of a woman. . . . It seems therefore to be the duty of the Courts to keep the power strictly within the limits which the law has assigned to it." These remarks are liable to be understood, as indeed they have been understood, that the motive of a widow in making an adoption may be scrutinised in each case. Observations in later decisions of the Privy Council indicate that such a construction was not intended. Adverting specifically to the question, in *Vellanki Venkatakrishna Rao* v. *Venkata Rama Lakshmi*,[6] Sir James Colvile remarked that it would be very dangerous to introduce into the consideration of these cases nice questions as to the particular motives operating on the mind of the widow and that what was stressed in the *Ramnad case* was not that there should be evidence of the widow's motive but that there should be evidence of such assent on the part of the sapindas as should be sufficient to support the inference that the adoption was made by the widow after a fair consideration by what may be called a family council of the expediency of substituting an heir by adoption to the deceased husband. In other words there should be proof that in assenting to the adoption the sapindas did not act selfishly, frivolously, maliciously or without bestowing thought but acted after deliberation being satisfied that it was desirable and expedient to have a son affiliated to the deceased by an adoption by his widow, and that if the sapindas had sanctioned the adoption without such deliberation, then such sanction will be futile. In *Sri Krishnayya Rao* v. *Surya*

1. (1896) I.L.R. 22 Bom. 558.
2. (1896) I.L.R. 22 Bom. 199.
3. (1924) 20 L.W. 503, 516.
4. *Collector of Madura* v. *Mootoo Ramalinga*, (1868) 12 M.I.A. 397, 441 (P.C.).
5. (1876) I.L.R. 1 Mad. 69, 83 (P.C.).
6. (1876) I.L.R. 1 Mad. 174 (P.C.).

Rao Bahadur Garu,[1] Sir George Lowndes has pointed out: "She is said not to have made the adoption for the benefit of her husband or upon religious grounds, but merely in order to get hold of a substantial part of the property. Their Lordships doubt if, where the consent of the sapindas has been obtained, the motive of the adopting widow is relevant." In another case, *Vijaysinghji Chatrasinghji* v. *Shivsangji*,[2] the Privy Council remarked: "There is no evidence to prove any improper motive, and if the adoption causes harm to the plaintiff it nevertheless confers spiritual benefit upon the husband." These statements coupled with their Lordships' interpretation of their remarks in the *Ramnad case* do lend colour to the view taken in *Hari Ramayya* v. *Venkatachalapati*,[3] that the only person whose motive requires to be canvassed is the sapinda who either gives his consent or withholds his consent and not the widow. It is submitted that to regard this conclusion as "going too far" as has been suggested in the instant decision (see p. 807) is not quite justified. In Madras on the question of the widow's motive in adopting, there were till recently conflicting pronouncements. Some decisions—see *Anne Brahmayya* v. *Chelasami Ratayya*,[4] per Kumaraswami Sastri, J., in *Krishnayya Rao* v. *Raja of Pittapur*[5]—had suggested that motive is irrelevant. A number of other decisions took a contrary view, see majority view in *Krishnayya Rao* v. *Raja of Pittapur*,[5] *Kandasami Goundan* v. *Chinnammal*,[6] *Murahari Brahma Sastri* v. *Sumitramma*,[7] *Mangamma* v. *Ramanamma*.[8] The pronouncements in Bombay, in *Patel Vandravan Jekisan* v. *Patel Manilal Chunilal*,[9] *Mahableshwar* v. *Durgabai*,[10] *Ramchandra* v. *Mulji Nanabhai*,[11] that the widow's motive was irrelevant were explained away as due to the fact that in that presidency a widow's power to adopt was inherent and not derivative. In *Annapurnamma* v. *Appayya Sastri*[12]—a Full Bench decision—it was held that if the evidence bearing on consent leads to the conclusion that the motive which actuated the widow in making the adoption was to defeat the reversionary interest of the sapindas then the adoption would necessarily be invalid. The later decisions in Madras favouring this view took their stand on precedents in this presidency while the earlier decisions placed reliance on the observations in the *Ramnad case*. The interpretation put on the latter case by the Privy Council in the *Guntur case*,[13] coupled with its remarks in *Sri Krishnayya Rao* v. *Surya Rao Bahadur*[1] and *Vijaysinghji Chatrasinghji* v. *Shivsangji*,[2] show that such a view is no longer tenable.

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1. (1935) 69 M.L.J. 388 (P.C.).
2. (1935) 68 M.L.J. 701: L.R. 62 I.A. 161: I.L.R. 59 Bom. 360, 365 (P.C.).
3. (1935) 70 M.L.J. 619.
4. (1924) 20 L.W. 503.
5. (1928) 55 M.L.J. 894: I.L.R. 51 Mad. 893 (F.B.).
6. (1933) 37 L.W. 729.
7. (1933) I.L.R. 57 Mad. 411: 66 M.L.J. 577.
8. (1934) 69 M.L.J. 602.
9. (1891) I.L.R. 15 Bom. 565.
10. (1896) I.L.R. 22 Bom. 199.
11. (1896) I.L.R. 22 Bom. 558.
12. (1928) 56 M.L.J. 760: I.L.R. 52 Mad. 620 (F.B.).
13. (1876) I.L.R. 1 Mad. 174 (P.C.).

SARADAMBAL *v.* SUBBARAMA AIYAR, (1941) 2 M.L.J. 862.

It is possible to take a view different from the conclusion arrived at in this case, that where a Hindu dies having at the time of his death an interest in joint family property and by the operation of S. 3 of the Hindu Women's Rights to Property Act, 1937, his widow becomes entitled thereto, such interest in her hands is liable to be attached and sold for the satisfaction of the debts of the deceased. In regard to the liability of a person's property after his death for his debts it is well settled that if it consisted merely of an undivided interest in a Mitakshara coparcenary the creditor can seek satisfaction from such interest only if during the lifetime of his debtor he had obtained a decree and at least attached his undivided interest. Survivorship will otherwise operate and the interest will pass beyond the reach of the creditors, the only exception to the rule being the case of a father and son founded on the pious obligation rule. Such being the case, the nature of the succession when a widow becomes entitled to her husband's coparcenary interest under S. 3 (2) of the Hindu Women's Rights to Property Act becomes material. Does she take as in a case of inheritance or does she take by survivorship and if it is in the latter mode is there any principle analogous to the pious obligation rule by which such interest in her hands would become available to the creditor for satisfaction of her husband's debts? The doctrine of pious obligation with its corollary of right by birth rests on the relationship of persons as father and son and can hardly be applied to a case of husband and wife unless it be that on marriage the wife can be regarded as becoming a co-owner with the husband. Texts of Apasthamba,[1] Datta and other sages no doubt lend colour to the theory of co-ownership between the spouses but as a legal doctrine it has nowhere been accepted. Not being a co-owner it follows that the widow does not take by survivorship. Consequently no impediment that way can arise to bar the husband's creditor from proceeding against his interest in the joint family property. S. 3 (2) of the Hindu Women's Rights to Property Act enacts that "when a Hindu . . . dies intestate having at the time of his death an interest in a Hindu joint family property, his widow shall, subject to the provisions of sub-S. (3), have in the property the *same* interest as he himself had. 'Same' means 'identical', 'not differing in kind', 'like in quality'. It follows that the widow takes the interest with all the incidents which it had possessed originally, subject only to the modification imposed by sub-S. (3), namely, that it is to be a Hindu woman's estate with however the *same right* of claiming partition as a male owner. In the case of a male owner to call for partition rests on his discretion. Till the call is made he can have the benefit of survivorship and his interest quantitatively is inchoate and unascertained. The interest would become available to a creditor only if he had obtained a decree against the coparcener and attached it while he was alive. Since the widow is conferred "the same right of claiming partition as a male owner" it must follow that till she does so the incidents described above that had attached to that interest will *mutatis*

1. II, 6, 14, 16-20.

mutandis continue. The right to partition available to her will be that of a Mitakshara coparcener and comprises both the right to stop with a disruption in status only or to ask for a division by metes and bounds. On this hypothesis it would seem that the widow is not to have a position analogous to that occupied by her *vis a vis* under the Dayabhaga law as the holder of a partitioned succession but is to acquire one comparable in every way to that of a male coparcener subject only to restrictions on her power of alienation. The case of an illegitimate son becoming a coparcener with a legitimate son of his father in regard to the paternal properties—see *Jogendro* v. *Nityanand*[1]—on the father's death shows that there is nothing repugnant in holding that though the widow was no co-owner while her husband was alive she may on his death become a co-owner with the other members of the joint family, though the quality of the interest possessed by her is different from that of the others. To hold otherwise would result in interpreting S. 3 as giving the widow not the same but a different type of the right of claiming partition. The observations of Sir Barnes Peacock in *Moniram Kolita* v. *Keri Kolitani*[2]:—"According to the Hindu law a widow who succeeds to the estate of her husband in default of male issue, *whether she succeeds by inheritance* or *by survivorship,* does not take a mere life-estate in the property. The whole estate is for the time vested in her absolutely for some purposes, though in some respects for a qualified interest"—do not militate against the construction of S. 3 suggested above. Thus under S. 3 (2), the widow does not take by survivorship; nor does she take as in the ordinary course of inheritance. It is also noteworthy that while sub-S. (2) confers on her the 'same interest' as her *husband* had, sub-S. (3), gives her 'the same right of claiming partition as *any male owner.*' In regard therefore to the liability for the husband's debts, the interest being un-severed and her status being that of a coparcener and her rights that of any male owner, unless something had been done to sequestrate the interest prior to the husband's death as by attachment in execution of a decree obtained against him, it will cease to be available to the creditor. To argue as has been done in the instant case that if a son taking his father's interest by survivorship would hold the interest subject to the liability of its being attached and sold for his father's debts it would be unreasonable to allow a widow to stand in a better position overlooks the fact that the son enjoys an advantage in another direction, namely, that he takes absolutely and thus is in a superior position. There is the further fact that Act XVIII of 1937 is intended to improve the position of women and cannot be read so as to enlarge the rights of creditors. A statute is *prima facie* to be construed as changing the law to no greater extent than its words or necessary intendment require, see *Secretary of State for India* v. *Bank of India.*[3] These reasons suggest that S. 3 (2) may justifiably receive a construction different from that adopted in the decision under notice.

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1. (1890) L.R. 17 I.A. 128: I.L.R. 18 Cal. 151 (P.C.).
2. (1880) L.R. 7 I.A. 115: I.L.R. 5 Cal. 776 (P.C.).
3. (1938) 2 M.L.J. 169: L.R. 65 I.A. 286, 298: I.L.R. (1938) Bom. 502 (P.C.); *see also* Maxwell on Interpretation, 7th Edn., p. 204.

VENKATRAMAYYA *v.* SESHAYYA, (1941) 2 M.L.J. 877.

This case discusses the question whether a Hindu father who became a convert to Christianity and later on reverted to Hinduism can by his reconversion restore the coparcenary relationship between himself and his son. The re-union contemplated by the texts of Hindu law is one resting on the intention of the parties to the original partition to re-unite and even then will be permissible not with any person indifferently but with certain persons only—see *Ram Narain* v. *Pan Kuer.*[1] Being founded on mutual intention there can be no re-union with a minor,—see *Bala Bux* v. *Rukhmabai,*[2] *Venkata Reddi* v. *Kuppa Reddi.*[3] The father, however, in Hindu law possesses *qua* father the power to effect a partition among his sons *inter se* irrespective of their volition.[4] Likewise he has the unqualified power to give away his sons in adoption and thereby alter their status and position. If the status of a minor son can thus be altered by the father in virtue of his parenthood and independently of the son's wishes can it not be said that the father's power to affect his son's status by a compulsory partition will include the power to restore him to his original status by re-union and that the case of father and son stands outside the doctrine of intention altogether? In *Babu* v. *Gokuldoss Govardhandoss,*[5] Venkatasubba Rao, J., remarked—"It is then urged that it is contrary to principle to hold that the father by re-union can affect the son's status. The Hindu law does recognise the father's power to alter the son's joint family status into one of separation. There is nothing inherently illogical in the father therefore possessing the power of converting his son's status of a separated member into that of a re-united member." These observations are general and may not admit of being distinguished merely on the ground that the case in question was not one of re-union between father and son. In any event the opinion of Venkatasubba Rao, J., may avail only to the extent of holding that if in the exercise of his volition a father disrupts the joint status between himself and his minor son, then, by another unilateral exercise of volition on his part he can restore the minor son to his original status. Where however the initial severance is not by act of party but by operation of law such as on conversion, will the case stand on a different footing? In *Abraham* v. *Abraham,*[6] Lord Kingsdown observed:—"What is the position of a member of a Hindu family who has become a convert to Christianity? He becomes as their Lordships apprehend at once severed from the family. . . . The tie which bound the family is, so far as he is concerned not only loosened, but dissolved. The obligations consequent upon and connected with that tie must as it seems to their Lordships be dissolved with it." Conversion is thus on a par with partition as regards its legal effects. No doubt on conversion a father does not lose his power to give his Hindu

1. (1935) 68 M.L.J. 139: L.R. 62 I.A. 16: I.L.R. 14 Pat. 268 (P.C.).
2. (1902) L.R. 30 I.A. 130: I.L.R. 30 Cal. 725 (P.C.).
3. (1918) M.W.N. 680.
4. Mitakshara I—ii—2; *ibid.*, I—vi—7.
5. (1928) 55 M.L.J. 132.
6. (1863) 9 M.I.A. 199 (P.C.).

son in adoption—see *Sham Singh* v. *Santa Bai*,[1] *Kusum Kumari* v. *Satya Ranjan*.[2] It has however been nowhere recognised that even after conversion to an alien faith a father can still bring about a partition among his sons *inter se*, by merely getting reconverted or otherwise. The analogy afforded by a father (of a minor son) marrying under the Special Marriage Act, 1872, as amended in 1923 is also suggestive. The father will by operation of the statute become severed from the son and it will be impossible to maintain that he will have still the parental power to restore the joint status by re-union, since the parties will then be subject to different laws in relation to their property. It is not thus as if every parental power would continue after conversion. The parental power being lost by the conversion, a re-conversion on his part to his original faith cannot remit the parties to their original status. Conversion may operate as a partition but re-conversion cannot act as a re-union.

EMPEROR *v.* GORDHAN KALIDAS, I.L.R. (1942) Bom. 7.

This case deals with a point on which there is a conflict of judicial opinion. It holds that it is not requisite for the purposes of S. 373, Indian Penal Code, dealing with the offence of buying, hiring or otherwise obtaining possession of a minor for purposes of prostitution that the possession of the minor should have been obtained *from a third person*. S. 373 occurs in the chapter dealing with offences against the human body and along with S. 372 is presumably intended to cover the case of trafficking in minor girls. At first sight, an examination of its language suggests that it is a counter-part of S. 372 and cannot be treated as self-contained. The wording of the two sections is extremely close. It looks as if "sells" in S. 372 corresponds to "buys" in S. 373 and "lets to hire" in the former section is in juxta-position to "hires" in the latter. It would therefore be a somewhat strained interpretation to hold that "otherwise obtains possession" in S. 373 does not correspond to "otherwise disposes of" in S. 372. In other words, "otherwise obtains possession" should be understood *ejusdem generis* with "buying" and "hiring," *Jateendra Mohan Das* v. *Emperor*.[3] Buying and hiring of a minor are certainly transactions of which the minor is the object and other parties are subjects. There is much reason in what Holloway, J., said in *Dowlath Bee* v. *Sheik Ali*,[4] namely to bring a case within S. 373 possession must be obtained from a third party for a minor *ex vi termini* is incapable of binding herself by any contract. This view of Holloway, J., receives support from the later rulings in Madras, see *The Public Prosecutor v. Maddila Mutyalu*.[5] A contrary view of the meaning of "otherwise obtains possession" in S. 373 has been taken in a number of other decisions, see *per* Scotland, C.J., in *Dowlath Bee* v. *Sheik Ali*,[4] *Emperor* v.

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1. (1901) I.L.R. 25 Bom. 551.
2. (1903) I.L.R. 30 Cal. 999.
3. I.L.R. (1937) 2 Cal. 187.
4. (1870) 5 M.H.C. 473.
5. (1918) 35 M.L.J. 157.

Shamsundaribai,[1] *Sham Sunder Prusti* v. *Emperor*,[2] *Bhagchand Jasraj* v. *Emperor*.[3] These decisions purport to proceed on what is characterised as the "plain language" of the section untrammelled by other considerations. In *Bhagchand Jasraj's case*. Beaumont, C.J., while recognising that regard must be had to S. 372, in construing S. 373, nevertheless states that that would not justify a departure from the plain words of the latter section. This altogether ignores the principle that the words take colour from the context and that particularly in the case of penal statutes it may not be justifiable to construe the section apart from its intendment or object. For these reasons the construction of the words "otherwise obtains possession" in S. 373 suggested by Holloway, J., in *Dowlath Bee's case* seems to be preferable to that adopted in the decision under notice.

EMPEROR *v.* KARSAN JESANG, I.L.R. 1942 Bom. 22.

The decision in this case turns on the construction of the latter part of S. 211, Indian Penal Code, over which there are a number of conflicting rulings. It holds that for a case to fall within the second part of S. 211, criminal proceedings must have been instituted in a *Court* on a false charge and that if a case got no further than a police inquiry it will not fall within that part. S. 211 is laid in two parts. The first portion deals with cases where a person with intent to cause injury to another, *institutes* or *causes to be instituted* any criminal proceedings against that person or *falsely charges* such person with having committed an offence, knowing that there is no just or lawful ground for such proceeding or charge. The second half of the section provides for a heavier punishment being awarded *if such criminal proceeding be instituted* against a person *on a false charge* of an offence punishable with death, transportation, etc. The question is as to the interpretation to be given to the words "if such criminal proceedings be instituted." While the Calcutta, Madras, Patna, Sind and Oudh rulings as well as a recent pronouncement of the Allahabad High Court have adopted the view that a person can be held to have 'instituted' proceedings within the meaning of S. 211 if he had set the criminal law in motion by making a false charge to the police of a cognisable offence though the matter might have been carried no further after the police investigation, the Allahabad, Rangoon and Nagpur Courts have taken a different view. Viewed literally the language of the section seems to afford support to the Allahabad view. The first part of S. 211 covers two types of cases, namely, (1) instituting or causing to be instituted a criminal proceeding, and (2) falsely charging a person of having committed an offence. We must take it that the Legislature did not regard the phrases "institutes" or "causes to be instituted" and "falsely charges" as co-terminus. They refer to different cases though they might not be wholly exclusive. Of these, the second phrase alone occurs in the latter part of the section. The inference is therefore suggested that falsely charging a person by

1. (1920) I.L.R. 45 Bom. 529.
2. A.I.R. 1930 Pat. 219.
3. (1934) I.L.R. 58 Bom. 498.

a complaint to the police is not intended to fall within the latter part of S. 211 as it stands distinguished from instituting a criminal proceeding in the text of the first part of the section, and that instituting a criminal proceeding involves a prosecution before the Magistrate. Favouring a literal construction the Allahabad High Court has held in *Queen Empress* v. *Bisheshar*.[1] that where the offence committed does not go further than the making of a false charge to the police, the making of such a charge will not amount to the institution of criminal proceedings;—see also *Empress of India* v. *Pitam Rai*,[2] *Empress* v. *Parahu*,[3] *Emperor* v. *Jagmohan*,[4] *Barkatullah* v. *Sadho Kalwar*.[5] The Rangoon High Court has held that the expression "institutes criminal proceedings" can have reference only to proceedings before a Magistrate, *The King* v. *Ma Ban Gyi*.[6] In Nagpur, in *Sultan Ahmed* v. *Emperor*,[7] it was laid down that investigation by the police will not be a criminal proceeding against any person and setting the criminal law in motion by making a false charge to the police of a cognisable offence against a person does not amount to the institution of criminal proceedings. In Calcutta, the earlier rulings in *Queen* v. *Bonomali Sahai*,[8] *Raffee Mahomed* v. *Abbas Khan*,[9] *In the Matter of the petition of Kader Baksh*[10] had all held that even the laying of a complaint before the police will amount to the institution of criminal proceedings. A later decision in *Queen Empress* v. *Karim Baksh*[11] took a different view and the question then fell to be considered by a full bench of five Judges in *Karim Baksh* v. *The Queen Empress*,[12] which affirmed the earlier view. The reasoning of the Full Bench was as follows: There are two modes under the Criminal Procedure Code in which an aggrieved person may seek to put the criminal law in motion, namely, either by giving information to the police (S. 154) or by laying a complaint (S. 191) before a Magistrate. Whichever mode is adopted the accuser is the same and the first step taken by him is also the last since from that time the control of the investigation or inquiry passes out of his hands, subject to this, that in the first mode if the result of the police investigation is against him, he may renew his complaint to the Magistrate. The two categories referred to in the first part of S. 211, "instituting criminal proceedings" and "falsely charging" cannot thus be mutually exclusive, for there is no mode by which a private accuser can institute criminal proceedings except by a charge and the latter part of S. 211 expressly speaks of "such proceedings instituted on a false charge." The latter phrase should therefore be understood to refer not to any one of the categories found in the first part

1. (1893) I.L.R. 16 All. 124.
2. (1882) I.L.R. 5 All. 215.
3. (1883) I.L.R. 5 All. 598.
4. (1908) 6 All.L.J. 989.
5. (1912) 17 I.C. 791.
6. (1938) Rang.L.R. 236.
7. A.I.R. 1931 Nag. 134 (F.B.).
8. (1866) 5 W.R.Cr. 32.
9. (1867) 8 W.R.Cr. 67.
10. (1874) 21 W.R.Cr. 34.
11. (1885) I.L.R. 14 Cal. 633.
12. (1888) I.L.R. 17 Cal. 574 (F.B.).

of the section only but to all of them. Following *Karim Baksh's case* in *Queen Empress* v. *Nanjunda Rao*,[1] the Madras High Court has observed that there is no warrant for holding that the words "institutes criminal proceedings" should be limited to the bringing of a charge before the Magistrate or to action by the Magistrate or police against the person charged; see also The *Sessions Judge of Tinnevelly Division* v. *Sivan Chetti*.[2] Likewise in *Parameshwar Lal* v. *King Emperor*[3] it has been held by the Patna High Court that a charge laid before the police without anything more will amount to instituting criminal proceedings within the meaning of S. 211. In *Dharamdas Hiranand* v. *Emperor*[4] the opinion has been expressed that no distinction should be drawn between the first and second parts of S. 211, between proceedings before the police and proceedings before the Magistrate. A similar view is to be found in *Balak Ram* v. *Emperor*.[5] The latest pronouncement of the Allahabad High Court in *Emperor* v. *Johra*[6] has dissented from the earlier rulings of that Court and adopted the construction of S. 211 as laid down by the Calcutta High Court on the ground that the weight of authority was heavily in favour of that view. The learned Judges also point out that the definition of "investigation" in S. 4 (1) (*l*) of the Criminal Procedure Code, shows that criminal proceedings include investigations by a police officer. This decision of the Allahabad High Court and its repudiation of the earlier Allahabad view have not been noticed in the instant decision. The different views held on the matter were adverted to in Bombay, in *Imperatrix* v. *Jijibhai Govind*[7] but the matter was left open. In view of the conflicting decisions on the scope of the latter part of S. 211 it is desirable that the doubt should be resolved either by suitable amendments to the section or by a decision of the Privy Council.

EMPEROR v. NINGAPA RAMAPPA KURBAR, I.L.R. 1942 Bom. 26.

A notable point concerning the powers and constitution of a full bench is raised by Beaumont, C.J., in this case. He points out that it would seem anomalous to hold that a later full bench can over-rule an earlier full bench merely because the later bench consists of more Judges than the earlier. It will be much more so where for instance the earlier ruling was a unanimous one of five Judges while the later pronouncement was that of a full bench of seven Judges by a majority of four to three. Apart from the legal question whether a later full bench can over-rule an earlier full bench, even numerical superiority in such a case will be with the sponsors of the earlier view. In fact the observations of Beaumont, C.J., fell to be made in connection with the effect of a full bench decision in *Emperor* v. *Purshottam Iswar*[8]

1. (1896) 7 M.L.J. 16: I.L.R. 20 Mad. 79.
2. (1909) I.L.R. 32 Mad. 258.
3. (1925) I.L.R. 4 Pat. 472.
4. I.L.R. (1939) Kar. 711.
5. (1941) 196 I.C. 262 (Oudh).
6. A.I.R. 1931 All. 269.
7. (1896) I.L.R. 22 Bom. 596, 599-600.
8. (1920) I.L.R. 45 Bom. 834 (F.B.).

where by a majority of four to one, a view different from that held unanimously by a full bench of four Judges in *Queen Empress* v. *Murugappa bin Ningappa*[1] came to be laid down. There seems very little authority on the powers and constitution of a full bench. There can be no doubt that a full bench must consist of three or more Judges. Rule 5 of the Madras High Court Appellate Side Rules, for instance, provides that a full bench shall be a bench of any number not less than three of the Judges for the time being present as Judges of the Court. It is also indisputable that a full bench can over-rule a division bench and that where a question had been referred to a full bench and answered it will not be open to a division bench to treat the answer to it as an *obiter dictum* merely—see *Raja of Mandasa* v. *Jagannayakulu.*[2] Where however a division bench feels that the ruling of a full bench requires to be reconsidered the proper procedure will be to refer the matter to the Chief Justice who at his discretion may constitute a *special* and *larger* bench, *ibid.* In stating the practice of the Calcutta High Court in these matters, Sir Lancelot Sanderson, C.J., has observed in *Enatullah* v. *Kowsher Ali*[3] that a decision of a full bench could only be upset by the Privy Council or *by a bench specially constituted by the Chief Justice to consider the matter.* An earlier full bench view can be reversed by a special bench,[4] but even then, it stands to reason that the later decision to have that effect must be that of a larger number of Judges subscribing to that view than the number of Judges actually responsible for the earlier view. In the course of his judgment in *Amirthammal* v. *Vallimayil Ammal*[5] where incidentally the effect of the observations of a full bench of three Judges in *Pudiava Nadar* v. *Pavanasa Nadar*[6] on a point in variance with the view expressed in a unanimous decision of an earlier full bench of five Judges in *Krishna v. Sami*[7] had to be considered, Sir Lionel Leach, C.J., remarked: "I am not prepared to accept *Pudiava Nadar* v. *Pavanasa Nadar*[6] in preference to *Krishna* v. *Sami*[7] where the two decisions conflict, but even if I were so inclined, I should not be able to follow *Pudiava Nadar* v. *Pavanasa Nadar*[6] because the decision in *Krishna* v. *Sami*[7] is a decision of a larger bench and *therefore* is an over-riding authority." Even where the later ruling is that of a larger special bench it cannot in reason upset an earlier full bench, unless the number of Judges actually subscribing to the view formulated as the decision of the special bench is larger than that responsible for the view in the earlier full bench.

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1. (1893) I.L.R. 18 Bom. 377 (F.B.).
2. (1931) I.L.R. 55 Mad. 883: 63 M.L.J. 450 (F.B.).
3. (1926) I.L.R. 54 Cal. 266.
4. *Chandra Binode Kundu* v. *Sheik Ala Buz Dewan,* (1920) 24 C.W.N. 818, 852 (S.B.).
5. S.A. No. 844 of 1938 (F.B.).
6. (1922) 45 Mad. 949: 43 M.L.J. 596 (F.B.).
7. (1885) 9 Mad. 64 (F.B.).

In the matter of RATANJI RAMAJI, I.L.R. 1942 Bom. 39 (S.B.).

A point of considerable public importance forms the subject of decision in this case which holds that the High Court can in the exercise of its inherent jurisdiction arising out of the Crown's prerogative as *parens patriae* to protect those who cannot protect themselves appoint a guardian of the interest of a minor coparcener in a Hindu joint family property and sanction an alienation of the minor's interest by the *karta* if such alienation will be in the minor's interest, and that such jurisdiction extends to minors and their property whether resident or situate within or without the limits of the High Court's ordinary original civil jurisdiction. It is now well settled that under Hindu law, a guardian cannot properly be appointed in respect of the infant's interest in the property of an undivided Mitakshara family, *Gharibullah* v. *Khalak Singh*.[1] The power, if any, which the Court may have in this respect has therefore to be sought outside the principles of Hindu law and such power, if existing, stands expressly saved by section 3 of the Guardians and Wards Act, 1890 in the case of the High Courts established under the statute 24 and 25, Vic. c. 104. It was provided by section 9 that the High Court shall exercise all such powers as shall be granted by the Letters Patent and except as otherwise provided therein, it shall have and exercise *all jurisdiction vested in the Supreme and Sudder Courts*. Cl. 17 of the Letters Patent of 1865, stated that the High Court shall have the like power with respect to infants and others in the province as was vested in the High Court immediately prior to the publication of the Letters Patent, *i.e.*, the power that it had under Cl. 16 of the Letters Patent of 1862, which had stated that the Court should have the same jurisdiction as was then vested in the Supreme Court. The powers vested in the Supreme Court were the same as those possessed by the Courts of Chancery in England—*See* Cl. 25 of the Charter of 1774, establishing the Supreme Court at Fort William, Cl. 32 of the Charter of 1800, constituting the Supreme Court at Madras and Cl. 37 of the Charter of 1823 relating to the Supreme Court at Bombay. As was observed in *Annie Besant* v. *Narayaniah*,[2] "the jurisdiction in connection with the estates and persons of minors is.. . . . . the jurisdiction which was exercisable by the Lord Chancellor in England acting for the sovereign as *parens patriae*, when the Supreme Court . . . . . . was instituted." In England, the Court of Chancery has always had the power of appointing guardians for infants on a proper case being made, whether such infants have property or not, see *Re Spence*,[3] *Re Flynn*.[4] Being a jurisdiction flowing from the Crown's prerogative and exercisable on the merits of each individual case, the jurisdiction transcended purely territorial limits as well as differences of race. *Prima facie* therefore the chartered High Courts in India would have the same power unless it had been cut down in any direction by specific

1. (1903) I.L.R. 25 All. 407: L.R. 30 I.A. 165 (P.C.).
2. (1913) 25 M.L.J. 661, 686.
3. 2 Phil. 247, 252.
4. 2 De G. & Sm. 457, 481.

legislation. In *In the matter of Phanindra Chandra Set.*[1] Panckridge, J., took the view that section 14 of 13 Geo. III, c. 63 had the effect of confining it beyond the limits of the High Court's ordinary original civil jurisdiction to British subjects only and that in the early statutes the term "British subject" always meant a subject of the King of British birth. To some extent colour is lent to such construction by the language of Cl. 4 of the Charter of 1800, establishing the Supreme Court at Madras distinguishing between *natives* and *British subjects.* The view of Panckridge, J., cannot be accepted for two reasons. As pointed out in *Raja of Vizianagaram* v. *Secretary of State,*[2] even assuming that prior to the passing of the Government of India Act, 1858, the jurisdiction of the Supreme Court did not extend to the native Indian minors in the mufassal such a bar cannot exist after the assumption of direct control of India by the Crown, for the moment such control was assumed every native of India became *ipso facto* a British subject and from that time onwards until its abolition, the Supreme Court could have exercised jurisdiction over native Indian minors in the mufassal and the High Court has therefore succeeded to such jurisdiction. Apart from this reason, it is clear that section 14 of 13 Geo. III, c. 63 in specifying jurisdiction does not purport to derogate from any jurisdiction that can exist in the Supreme Court outside it. It has been held in a number of cases that a chartered High Court has inherent jurisdiction to appoint a guardian to a minor and his property not merely within but also without the limits of its ordinary original civil jurisdiction though the minor is not an European British subject, *In re Shannon,*[3] *Ellen Ramm* v. *Charles Spencer,*[4] *In the matter of Govind Prasad,*[5]*In re Tarunchandra Ghosh,*[6] *Raja of Vizianagaram* v. *Secretary of State.*[2] The ruling to the contrary in *In the matter of Srish Chunder Singh,*[7] was probably due to the impression (erroneous in fact) that there were no precedents in India where such a power had been exercised; also in that case there were testamentary guardians who were sought to be displaced.

The power is however one to be exercised with the greatest caution, *Re Manilal Hurgovan.*[8] Instances of the exercise of the power are to be found in *Re Jairam Luxmon,*[9] *Re Jagannath Ramji,*[10] *Re Manilal Hurgovan*[8] *Narsi Tokersey and Co.* v. *Sachindranath Gajanan,*[11] *In re Mahadev Krishna Rupji.*[12] Where the Court has refused to exercise the power it has been on the ground of inexpediency, *In the matter of Govind Prasad.*[5]

The power has been invoked in Bombay over a long number of years to get the High Court to sanction contemplated sales or mortgages of a minor's interest by the *karta* as being beneficial to the minor so as to protect the prospective alienees.

1. (1930) I.L.R. 58 Cal. 919.
2. I.L.R. 1937 Mad. 383: 71 M.L.J. 873.
3. (1870) 2 N.W.P.H.C.R. 79.
4. (1903) 2 All.L.J. 81.
5. (1928) I.L.R. 50 All. 709.
6. (1929) I.L.R. 57 Cal. 533.
7. (1893) I.L.R. 21 Cal. 206.
8. (1900) I.L.R. 25 Bom. 353.
9. (1892) I.L.R. 16 Bom. 634.
10. (1895) I.L.R. 19 Bom. 96.
11. (1929) I.L.R. 54 Bom. 75.
12. I.L.R. 1937 Bom. 432.

Such sanction was accorded in *Re Manilal Hurgovan,*[1] *Narsi Tokersey and Co.* v. *Sachindranath Gajanan,*[2] *In re Mahadev Krishna Rupji,*[3] but was refused in *In the matter of Govind Prasad,*[4] *In re Dattatraya Govind Haldankar.*[5] In the last of these cases in refusing sanction, Kania, J., observed: "It is clear that it is the duty of a purchaser or a mortgagee to enquire and satisfy for himself that a necessity has arisen or such circumstances are there as would entitle in law the manager to enter into the proposed transaction on behalf of the joint family and which would be binding on the minor members of the family. . . . I think that it is not proper for the purchaser or a mortgagee to cast that obligation of making the inquiries on the Court and contend that unless the Court sanctions the transaction he will not enter into the same. The opportunities for testing the grounds on which the alleged necessity or benefit to the family have come into existence, are as compared with the purchaser, few to the Court. . . . . I do not think that the Court should be ordinarily called upon to make such an order on the mere *ex parte* statements of an interested party." Kania, J's., view that the alienee has no right to cast the obligation of inquiry, etc., on the Court and that the Court should not be called upon to shoulder the burden of adjudicating on the merits of each proposed alienation was dissented from in a later ruling in *In re Mahadev Krishna Rupji.*[3] In doing so, Beaumont, C.J., remarked: "He (the alienee) does not seek to cast any burden upon the Court; he merely says that he is not going on with the transaction unless he gets a good title. Now it is very difficult in many cases for a purchaser or a mortgagee to satisfy himself as to the existence of legal necessity or benefit of the estate. It is very difficult for him to check the truth of the story told to him . . . . . and not only has he to do that, but he has to preserve evidence which will be available in years to come against any attack by a minor son of the manager. . . . This burden . . . is a very heavy and often an unreasonable one. It seems to me that as the Court has jurisdiction to make an order sanctioning the transaction it ought in a proper case to do so." Rangnekar, J., added that assuming that it is a burden on the Court there was no reason why the Court should fight shy of discharging or bearing that burden.

In applying these principles, it is pointed out in the instant decision that the Court's sanction which protects the purchaser ought not to be granted on *ex parte* applications and that the minors should be made respondents and an independent guardian-*ad-litem* should be appointed to protect the interests of the minors.

LALCHAND HIRACHAND *v.* TULJARAM RAOJI, I.L.R. (1942) Bom. 67.

This case is of interest although it cannot be said to have laid down new law. It decides that the opening words of section 75 (1) of the Provincial Insolvency Act cannot be construed as

1. (1900) I.L.R. 25 Bom. 353. 2. (1929) I.L.R. 54 Bom. 75.
3. I.L.R. 1937 Bom. 432. 4. (1928) I.L.R. 50 All. 709.
5. (1932) I.L.R. 56 Bom. 519.

conferring an absolute right of appeal on the debtor, any creditor or the receiver in every case, associating the words "aggrieved by a decision" only with the words immediately preceding them in the section, namely, "any other person". A number of cases have taken the same view, *Pursingh* v. *Aladkhan*,[1] *Maung Tun Tin* v. *Chettyar Firm*,[2] *Achhru Ram* v. *Padam Parshad*.[3] There is however a ruling of the Oudh Chief Court, which seems to suggest that even where a creditor is not aggrieved by a decision he may have a right of appeal under section 75 (1), *Kanhaiya Lall* v. *Badhu*.[4] It is difficult to agree with such suggestion. The use of the words "*any other*" qualifying "*person*" seems by itself to indicate that the right of appeal is restricted to the category of persons who are "aggrieved"; otherwise, the section would have run "the debtor, any creditor, the receiver or any person aggrieved." Further the subject-matter of the appeal is adverted to only in the description following the word "aggrieved," and a contrary construction would give a right of appeal to the debtor, any creditor and the receiver without any indication of what they are to appeal against. Again that the term "aggrieved" is intended to qualify all the categories of persons referred to in sub-section (1) is borne out by the second proviso to that sub-section giving a right of second appeal to "any such person aggrieved by a decision of the District Court" which makes it absurd to assume that the right is given only to persons other than the debtor, any creditor and the receiver.

MULRAJ VIRJI *v.* NAINMAL PRATAPCHAND, I.L.R. 1942 Bom. 83.

A point of some importance fell to be decided in this case, which held that where the due date for repayment of a mortgage debt has passed it is not competent to the mortgagor to sue for an injunction to restrain the mortgagee from exercising the power of sale given to him by the mortgage deed without offering to redeem and tendering the amount due. This is also the English rule, *Hickson* v. *Darlow*,[5] *Hill* v. *Kirkwood*,[6] *Macleod* v. *Jones*.[7] The filing of a suit for redemption by itself will not be a ground for restraining the mortgagee from exercising his power, *Adams* v. *Scott*,[8] *Prichard* v. *Wilson*,[9] *Ramakrishna Mudali* v. *Official Assignee*,[10] *Jagjivan Nanabhai* v. *Shridar Balkrishna Nagarkar*,[11] *Babamiya Mohidin Shakkar* v. *Jehangir Dinshaw Belgaum Wallah*.[12] The mortgagor cannot derogate from that which he has in express terms conferred upon the mortgagee by the instrument namely, the power of sale. "To hold otherwise would simply be to tear up the instrument which contains the contract agreed upon between the parties", *Ramakrishna Mudali* v. *The*

1. A.I.R. 1933 Nag. 9.
2. 1937 Rang.L.R. 264.
3. A.I.R. 1941 Lah 243.
4. (1937) 170 I.C. 542.
5. (1883) 23 Ch. D. 690.
6. (1880) 28 W.R. (Eng.) 358.
7. (1883) 24 Ch.D. 289.
8. (1859) 7 W.R. (Eng.) 213.
9. (1864) 10 Jur. (N.S.) 330.
10. (1922) I.L.R. 45 Mad. 774: 43 M.L.J. 566.
11. (1877) I.L.R. 2 Bom. 252.
12. I.L.R. (1941) Bom. 506.

Official Assignee,[1] see also *Muncherji Furdonji Mehta* v. *Noor Mahomedbhoy Jairajbhoy Pirbhoy.*[2] Apart from the case of offering to redeem and tendering the amount due, an injunction may be granted where the power of sale is exercised fraudulently or improperly or contrary to the terms of the mortgage, *Jagjivan Nanabhai* v. *Shridar Balkrishna Nagarkar,*[3] *Jerup Teja and Co.* v. *Peerbhoy,*[4] *Babamiya's case,*[5] or where the amount claimed by the mortgagee is obviously not due to him on the face of the mortgage deed itself, *Hickson* v. *Darlow.*[6] But an injunction will not issue merely because the amount is in dispute, *Gill* v. *Newton.*[7]

CONTRACTOR *v.* GAJRAJ SHEOKARAMDAS, I.L.R. 1942 Bom. 124.

Though the actual decision in the case that the period of limitation prescribed by Art. 183 of the Limitation Act will govern the enforcement of rights under an award on submission on being filed on the original side of the High Court under section 15 of the Indian Arbitration Act, 1899 may be accepted as correct particularly as it follows an earlier ruling of the Calcutta High Court in *Chaitram Sagormull* v. *Hardwari Mull and Co.,*[8] there being no decision to the contrary, it is difficult to agree with the dictum of Beaumont, C.J., that the expression "as if it were" in section 15 of the Arbitration Act has a wider scope than the words "in the same manner as" found in certain other enactments. According to the learned Chief Justice, while the latter expression would refer to the *method* of execution only the former would refer to both *manner as well as extent.* The view no doubt receives support from a decision of the Lahore High Court in *Pokhar Das* v. *Radhakishen,*[9] but there are a number of decisions holding that the words "as if it were" do not connote anything different from the words "in the same manner as" or "in like manner as", see *Chinnasami Mudali* v. *Thirumalai Pillai,*[10] *Ibrahim Khan Sahib* v. *Rangasami Naicken.*[11]

DATTATRAYA KASHINATH *v.* VITHALDAS BHAGWANDAS, I.L.R. 1942 Bom. 132.

Regarding the nature of the duty imposed on the Court in recording an adjustment under O. 21, r. 2 (1), Civil Procedure Code, Beaumont, C.J., has remarked in this case "that although the Court is not concerned to consider the merits of the adjustment it is concerned to consider whether the arrangement to be recorded is an adjustment, that is to say a *legal* adjustment". There is nothing in the language of r. 2 (1) to warrant the Court taking upon itself any such duty. It is the satisfaction of the decree-holder to which the rule adverts and not the satisfaction of the

1. (1922) I.L.R. 45 Mad. 774: 43 M.L.J. 566.
2. (1893) I.L.R. 17 Bom. 711.
3. (1877) I.L.R. 2 Bom. 252.
4. (1920) 23 Bom. L. R. 211.
5. I.L.R. (1941) Bom. 506.
6. (1883) 23 Ch.D. 690.
7. (1866) 14 W.R. (Eng.) 490.
8. (1927) I.L.R. 55 Cal. 499.
9. (1923) 6 Lah.L.J. 564: A.I.R. 1924 L. 544.
10. (1901) I.L.R. 25 Mad. 572.
11. (1905) I.L.R. 28 Mad. 420.

Court. On the decree-holder certifying such satisfaction the Court *shall record* the same. The rule imposes a duty on the decree-holder to certify and a duty upon the Court on such certification being given to record the same, *Shri Prakash* v. *Allahabad Bank.*[1] As pointed out in *Maung Kyaw Min* v. *Ma Hpaw,*[2] on certification by the decree-holder the Court has no alternative but to record satisfaction and "not only is it not the duty of the Court to satisfy itself before recording satisfaction that the statements in the decree-holder's petition are correct, but on the contrary the Court has no authority whatever to question those statements". A number of cases have taken the view that when the decree-holder certifies the adjustment the executing Court has no power to go into the question whether there has not been an adjustment as stated, *Mt. Champi Bai* v. *Pearey Lal,*[3] *Gamen Shah* v. *Jhangi Ram,*[4] *Lodd Govindoss* v. *Ramdoss Vishnudoss,*[5] or whether the satisfaction was intended to defraud or defeat the rights of some third party, *Kadir Meera Sahib* v. *Pir Mahomed.*[6] This view stands strengthened if regard is had to the language of r. 2 (2), where express provision is made in the case of an application by the judgment-debtor to record satisfaction or adjustment for notice to the judgment-creditor and inquiry. The difference between the two sub-sections seems to have been deliberately intended, for an application by the decree-holder to record satisfaction of the decree is *prima facie* an application against his own interest and therefore no duty is cast upon the Court to consider the propriety of the adjustment. There is no particular form either prescribed in this connection and the decree-holder may well rest content with making a bald statement that the decree has been satisfied wholly or in part. If however the materials put before the Court by the decree-holder are such *as to put the Court on notice* that there was a dispute between the parties as to whether the amount certified was less than the amount actually paid, it may be that, there is no illegality in the executing Court giving notice to the judgment-debtor and entering into an inquiry as to whether more has been paid than that which the decree-holder certifies, *Veeraraghavayya* v. *Venkata Lakshmayya.*[7]

In holding that under r. 2 (1) also the Court can examine the nature of the adjustment, the learned Chief Justice in the instant decision refers to the necessity for the Court's sanction where the guardian of a minor applies for satisfaction to be recorded which will necessitate an inquiry by the Court into the alleged adjustment. This argument overlooks the fact that the consent of the Court in such cases and the necessity for inquiry flow out of the provisions of O. 32, r. 7, Civil Procedure Code and not by reason of anything contained in O. 21, r. 2 (1).

EMPEROR *v.* SADEPPA GIREPPA, I.L.R. (1942) Bom. 115.

Section 138, Evidence Act makes it clear that in the order of proceedings witnesses shall be first examined-in-chief, then (if the

1. (1929) L.R. 56 I.A. 30: 56 M.L.J. 233: 3 Luck. 684 (P.C.).
2. A.I.R. 1931 Rang. 332.
3. A.I.R. 1938 All. 116.
4. A.I.R. 1920 Lah. 73.
5. (1912) 17 I.C. 752.
6. (1933) 64 M.L.J. 732.
7. A.I.R. 1936 Mad. 468.

adverse party so desires) cross-examined. It is obvious that there can be no real cross-examination, if there has been no examination-in-chief preceding it. It is a salutary rule that the prosecution should bring before the Court and examine all the witnesses who are alleged, or are known to have knowledge of the facts, *Queen Empress* v. *Ram Sahai Lall.*[1] What then is to be done where the prosecution does not wish to examine a witness because it has been found necessary to treat him as a hostile witness in the committal enquiry? A practice has come into vogue for the prosecution to tender such witnesses for cross-examination. No doubt the practice may not result in much mischief if the witness is a secondary witness only but in other cases it might cause hardship. The practice has therefore been justly condemned (as in the instant decision) as being inconsistent with section 138, Evidence Act, *Veerakoravan In re,*[2] *Emperor* v. *Kasamalli Mirzalli.*[3] The practice if permitted will make it difficult for the Court to determine whether the witness is credible and the so-called cross-examination by the accused will in fact be an examination-in-chief and there will be no cross-examination by the Crown because he is supposed to be a prosecution witness. At the same time the Crown cannot be compelled to call before the Court a witness who it believes is not going to speak the truth. Different courses have been suggested for adoption by different Courts in the circumstances. It has been stated in a Full Bench of the Bombay High Court that in such cases the Crown should inform the accused of the name of the witness and produce him in Court leaving it to the accused to call him or not as he thinks fit, *Emperor* v. *Kasamalli Mirzalli.*[3] A different course and a more salutary one is what has been suggested in *Guruswami Gounder, In re,*[4] namely, that it will be the duty of the Court when there is a really important witness whom the prosecution does not wish to examine because of his hostility in the committal enquiry to examine him as a Court witness and allow both sides to cross-examine him inasmuch as it is undesirable that the accused should be forced to examine him as a defence witness.

HAIDERSHA LALSHA v. DHONDU ARAJI, I.L.R. 1942 Bom. 198.

It is difficult to agree with the conclusion reached in the above case that the phraseology of section 346 (2) of the Criminal Procedure Code "to any magistrate subordinate to him having jurisdiction" is intended to mean "a subordinate magistrate other than the magistrate, who made the reference or report and competent to deal with the case as submitted." Nor is it easy to accept the statement that the magistrate to whom the report is sent under section 346 must assume the case as presented in the report submitted to him as correct for the purpose of dealing with it under sub-section (2). In effect the instant decision suggests that the magistrate to whom the report is sent cannot examine the validity of the conclusion reached by the referring magistrate as to his

1. (1884) I.L.R. 10 Cal. 1070.
2. (1929) I.L.R. 53 Mad. 69: 58 M.L.J. 145.
3. (1942) 44 Bom.L.R. 27 (F.B.). 4. (1941) 2 M.L.J. 209.

want of jurisdiction but must act mechanically and automatically on the statement. There is nothing in the language of section 346 (2) to warrant such a conclusion. Surely it cannot be that in acting under section 346 (2) the superior magistrate is discharging a purely ministerial function. An order referring the case to a particular class of Magistrate as having jurisdiction in the matter is one affecting the accused and as such has to be passed judicially, which must necessarily permit the superior magistrate to look into the materials on which the referring magistrate had concluded that he had no jurisdiction and be satisfied about the soundness of that view. No question of exercising any appellate or revisional power arises, for the referring magistrate may at any stage of the inquiry before him under section 347, as for instance, even before he has heard all the prosecution evidence, take the view that the evidence before him at that stage discloses *prima facie* an offence regarding which he has no jurisdiction and such view does not amount to an adjudication, since there is no judgment signed by him and he does not complete his dealing with the case. The referring magistrate arrives at a tentative or provisional conclusion only which may be scanned by the magistrate to whom the report is made and affirmed or otherwise treated. In this connection the provision contained in section 562, as to the submission of proceedings to a magistrate of the first class or a sub-divisional magistrate affords an instructive contrast. In such a submission the offender is actually convicted by the trying magistrate and hence when the case comes before the superior magistrate under section 380, the accused can be treated only as a convicted person and it will not be permissible for the magistrate acting under that section to interfere with the conclusion. *The Public Prosecutor* v. *Malaipati Gurappa Naidu.*[1] In a submission under sections 346 and 347, however the entire matter is at large because all the evidence need not have been heard and no judgment should have been given.

The view that the magistrate to whom the matter should be sent by the superior magistrate should not be the one who made the reference is sought to be supported on the ground that to hold otherwise would lead to an embarrassing situation if the subordinate magistrate remains unconvinced and the case might move like a see-saw unless the superior magistrate's view were regarded in law as binding on the magistrate. This reasoning is not altogether convincing. Though the superior magistrate is not in the technical sense exercising under section 346 any revisional or appellate powers still his opinion will always be treated with respect by the subordinate magistrate who will have to act in accordance with that view. The instant decision itself concedes that section 346 (2) "does not expressly prevent him from referring the case back to the reporting magistrate." The *argumentum ab inconvenienti* is more theoretical than real. As pointed out by a Full Bench of the Madras High Court in *Polur Reddi* v. *Muniswami Reddi,*[2] the sub-section is perfectly clear, definite and wide and its terms embrace a reference back of the case to the magistrate who originally submitted it.

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1. (1933) 66 M.L.J. 405.
2. (1930) I.L.R. 54 Mad. 16: 59 M.L.J. 308 (F.B.).

FIRM SARADA PROSAD DE *v.* BHUT NATH MALLIK, I.L.R. (1941) 2 Cal. 78.

This is an interesting case involving in effect a consideration of the doctrine of 'disturbance of performance' or *leistungsstorungen* as it is called in German. Subsequent to an agreement to buy a certain commodity at a fixed price, a Government Notification under rule 81 (2) (*b*) of the Defence of India Rules (the Defence of India Act being already in operation at the date of the contract) was promulgated by which a sale of the commodity at a price which was less than the contract price was alone legal. The buyer who was a retail dealer to the knowledge of the seller contended *inter alia* that the contract should be deemed to be avoided inasmuch as the Government Notification amounted to a frustration of the venture. In *Hirji Mulji* v. *Cheon Yue Steamship Co., Ltd.*[1], it was stated by Lord Sumner that in frustration "an event occurs *not contemplated* by the parties and therefore not expressly dealt with in their contract, which, when it happens frustrates their object." Goddard, J., explained the doctrine in *W. J. Tatem, Ltd.* v. *Gamboa*[2], as meaning that where a contract depends for its performance upon the continued existence of a certain state of facts, once that state of facts was destroyed the contract was frustrated (where the parties have made no provision for such an event) whether such event was or was not within the actual or deemed contemplation of the parties. The defence of frustration is thus open only where the parties have contemplated the continued existence of a certain state of facts. Again commercial impossibility or economic unprofitableness will *per se* be no excuse for failure to perform a contract, *Ezekiel Abraham* v. *Ramjusroy*[3]. In matters of business a thing is said to be impossible only when it is not practicable and a thing is impracticable when it can only be done at an excessive or unreasonable cost, *Moss* v. *Smith*[4]. Where the parties could have contemplated the contingency but did not provide for it the doctrine of frustration cannot apply, *Chandler Brothers* v. *Boswell*[5]. In the instant decision the contract was absolute. The Defence of India Act had already come into force. There was no reason to presume that the Government's power to control prices will remain a dead letter. Even after control the sale of the commodity did not become illegal. Sale at the prescribed price will no doubt result in loss. Mere loss cannot however be equated with "commercial impossibility" or "economic unprofitableness" within the meaning of the decisions. Nor is any distinction between a risk to business by Governmental control of price and a risk likely to arise through change in prices because of variations of demand and supply warranted. If it cannot be said that the risk of an interruption to traffic by weather conditions—by the formation of breaches, landslips, etc.,—could not have been foreseen and provided for in a contract relating to the collection of tolls—*see Sankaran* v. *District Board, Malabar,*[6] —much less can it be said in the instant decision that the parties contemplated the continuity of the state of affairs as it existed at the date of the contract and could not have in the circumstances of the

1. (1926) A.C. 497; *see also Sankaran* v. *District Board, Malabar,* (1934) 66 M.L.J. 108.
2. (1938) 61 C.L.R. 149.
3. (1920) 33 C.L.J. 151.
4. (1850) 9 C.B. 94, 103.
5. (1936) 3 All.E.R. 179.
6. (1934) 66 M.L.J. 108.

case foreseen a governmental control of the prices and provided for such a contingency.

HEMANTA KUMARI DEBI *v.* MIDNAPORE ZEMINDARI, CO., LTD., I.L.R. (1941) 2 CAL. 298.

It is possible to take a different view from that reached in this case which deals with the interesting question, how far lapse of possession occasioned by *vis major*, such as periodical floods, would amount to a break in the continuity of adverse possession held by a trespasser. Adverse possession is a *jus possessionis* in a person having no *jus possidendi* and to acquire title such possession must be actual, effective, visible, exclusive, hostile and continued during the time necessary to create a bar under the statute of limitation, *Jagendranath Rai* v. *Baldeo Das*[1]. Absolute security for the future is not requisite. All that is necessary is that according to the ordinary course of affairs one is able to count on the continuing enjoyment of the thing.[2] There can no doubt be no discontinuance by absence of use and enjoyment, *Leigh* v. *Jack*[3]; nor can there be continuance of adverse possession when the land is not capable of use and enjoyment so long as such adverse possession must rest on *de facto* use and occupation, *Basanta Kumar Roy* v. *Secretary of State for India*[4]. It is true that possession is not neceesarily the same thing as actual user and the nature of possession to be looked for and the evidence of its continuance must depend on the character and condition of the land in dispute and where no actual enjoyment is possible due to *vis major* the possession is deemed to continue so long as the land remains incapable of enjoyment; but no such presumption can arise in the case of a wrong-doer or trespasser, *Rakhal Chandra Ghose* v. *Durgadas Samanta*[5]. To sustain a claim to land on his part by limitation under the Indian Law there must be *actual* possession held by him or by persons deriving title from him, *Secretary of State for India* v. *Krishnamoni Gupta*[6]. There can be no continuance of adverse possession in law if the land is not capable of use and enjoyment by the rightful owner, *Sarat Chandra Maiti* v. *Bibhabati Debi*[7]. The rightful owner is not affected by anything short of actual possession held against him, *Seeti Kutti* v. *Kunhi Pathumma*[8]. Three propositions thus emerge: (1) without actual possession held no title can accrue on foot of adverse possession; (2) adverse possession cannot run against the rightful owner where the land remains incapable of enjoyment by him; and (3) the presumption as to continuance of possession during a period when actual enjoyment is not possible is not available to a trespasser. What then is the effect of submersion of land? Submergence *determines* the possession of a trespasser; the land becomes *derelict*; constructive possession is revived in the rightful owner and no adverse possession can run against him so long as the land remains in that state, *Secretary of State for India* v. *Krishnamoni Gupta*[6], *Jogendra Nath Saha Chaudhuri* v. *Maharaja Jagadindra Nath Ray*

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1. (1907) I.L.R. 35 Cal. 961.
2. Dernburg cited in Salmond's Jurisprudence, 9th edn., p. 378, f.n. (*i*).
3. (1879) L.R. 5 Ex.D. 264, 274.
4. (1917) 32 M.L.J. 505=L.R. 44 I.A. 104=I.L.R. 44 C. 858 (P.C.).
5. (1922) 26 C.W.N. 724.
6. (1902) L.R. 29 I.A. 104=I.L.R. 29 Cal. 518 (P.C.).
7. (1921) 34 C.L.J. 302.
8. (1915) 33 M.L.J. 320=I.L.R. 40 Mad. 1040, 1059.

Chaudhuri[1], *Secretary of State* v. *Wazed Ali*[2], *Maharaja of Cooch Behar* v. *Raja Mahendra Ranjan*[3], *Gajadhar Prasad Sahu* v. *Dulhin Gulab Kuer*[4]. It is immaterial if previous to the submersion the rightful owner had lost possession provided his title was subsisting, *Panchanan Sarkar* v. *Rani Basanta Kumari Dasi*[5], *Khedon Lal* v. *Rajendra Narain Singh*[6]. Nor is the legal result different where the submersion is not over a period of years but is seasonal only and for a period of a few months each time, *Basanta Kumar Roy* v. *Secretary of State for India*[7], *Maharaja of Cooch Behar* v. *Raja Mahendra Ranjan*[8], *Secretary of State for India* v. *Ram Bachan Lal*[9].

In the instant decision it was found that the land in dispute got flooded during the rainy season every year and remained under water for two or three months (p. 304). The learned Judges propounded the question whether the submersion put the disputed land out of the control of the trespasser and thus disturbed the continuity of his possession and answered it in the negative in the view that possession may be continuous even though the actual acts of enjoyment are at considerable intervals and that " the will itself may be sufficient if manifested in an appropriate environment of facts." They argued that the disputed land being capable of yielding only two crops and the occupier having raised those two crops every year in spite of the submergence during the rainy season his adverse possession was not broken. It is submitted that this is a wrong approach to the question at issue. That during the period of submersion no acts of enjoyment were had was admitted. That to bar the rightful owner, the land should continue to be capable of enjoyment by him is the law. That submergence determines a trespasser's possession, renders the property derelict and constructively vests it in the rightful owner are well settled principles. The result thus yielded by the law cannot be overridden by such features as the absence of evidence that the occupant could not use the land even if he wanted to do so, or that the very nature of the land showed that nothing active was required of the occupier to do. The presumption as to continuity of possession during the time when the land was incapable of enjoyment, as during submersion for months, not being available to a wrongdoer, it is for him to affirmatively establish a *de facto* possession, which being impossible in the circumstances of the case will negative the continuity of adverse possession against the rightful owner. This apart, the inference in law of continuity of adverse possession drawn by the Judges from the established facts of the case is also opposed to authority. In *Secretary of State for India* v. *Ram Bachan Lal*[9], on similar facts it was held by the Patna High Court that for submergence to interfere with continuous adverse possession it is enough if the submergence prevents such use and occupation of the land as the occupant would normally have but for the flooding, and that it could not be doubted that the flooding did in fact deprive the trespasser of the use and occupation of that land during the two or three months every year when it was under water and that the trespasser could not

1. (1921) 34 C.L.J. 133.
2. (1921) 34 C.L.J. 141.
3. (1921) 34 C.L.J. 465.
4. (1917) 57 I.C. 744.
5. (1925) 30 C.W.N. 497.
6. (1912) 51 I.C. 70 (Cal.).
7. (1917) 32 M.L.J. 505=L.R. 44 I.A. 104=I.L.R. 44 Cal. 858 (P.C.).
8. (1921) 34 C.L.J. 465.
9. (1940) I.L.R. 20 Pat. 497.

be said to be in *effective* possession during that time with the result that the possession of the true owner should be deemed to have revived. Likewise in *Loknath* v. *Manorath Ram*[1], where it was admitted that the land in dispute was submerged every year during the rains for three months and that at the end of the rains when the river fell and the land stood uncovered melons were grown on it and it was further found that whenever the lands so uncovered the defendants had taken possession of it and had enjoyed it in that way for more than twelve years, the Allahabad High Court held, that everytime the land was submerged the constructive possession of the true owner revived and he was not barred. Thus it is apparent as pointed out in *Trustees, Executors and Agency Co.* v. *Short*[2], the right of action in respect of the intrusion of the trespasser goes each time on submersion and limitation starts afresh every time the land stands uncovered after the period of submersion, a new cause of action coming into existence on the occupation of the uncovered land by the trespasser.

KASHI NATH PANDE *v.* EMPEROR, I.L.R. (1941) 2 CAL. 180.

An interesting point in the law of evidence came up for decision in this case which held that where a child on account of her tender years is incompetent to depose as a witness, evidence of statements made by her to other people or conduct amounting to a statement will also be inadmissible. English law rejects all transmitted or derivative evidence and all proof offered secondhand or *obstetricante manu*. Best has stated the rule to be that " no matter how unanswerably the absence of the original source is accounted for, the inferior evidence will not be received." It is clear that section 60 of the Indian Evidence Act also contemplates that derivative or secondhand proofs are not receivable *in causa*. Absence of opportunity to cross-examine the original source of information and non-existence of personal responsibility regarding the truth of the statements on the part of the person passing on the same dictate the rejection of secondhand proof. In England, where on a trial for assault with intent to ravish a very young child, evidence was given of information relative to the transaction which the child who was not examined had given to two other persons, on the question whether the reception of such evidence was legal being reserved, twelve judges unanimously held that such evidence could not be admitted. *R.* v. *Brasier*[3]. The facts in the instant decision were practically the same and the conclusion reached is in accordance with the principles of English law.

EMPEROR *v.* MAHAMMAD EBRAHIM, I.L.R. (1941) 2 CAL. 281.

This decision is noteworthy in more than one respect. It condemns the practice of sending instructions from the Government through the District Magistrate to the Public Prosecutor and having those instructions reported in the Court of the trying Magistrate who is subordinate to the District Magistrate, as one open to the gravest

1. (1912) 11 All. L. J. 68, see also *Ram Nain Misir* v. *Deoki Misir*, (1922) 20 All.L.J. 756.
2. (1888) 13 A.C. 793.
3. (1779) 1 Leach 199 : 168 E.R. 202, see also *R.* v. *Tucker* cited in Philips and Arnold on Evidence, Vol. I, p. 10, 10th Edn.

objection. It points out that such a procedure is not contemplated by the Criminal Procedure Code, that a Magistrate trying a case has to act judicially according to law just as much as if he were a Judge in the High Court and ought not to be subjected to anything which could savour of an instruction from an outside source and that if the Government desired to put in a petition or request to the Court for an adjournment it should do so directly through the Public Prosecutor. In memorable words, it lays down the admonition that those who issue instructions otherwise, those who forward such instructions and those who obey them do not act according to law. It is a wholesome rule that the Magistrate having seisin of the case should never be placed in a position likely to cause embarrassment to him by reason of instructions issued by his superior executive officer.

Another point laid down in the case under review is that a Magistrate has no power to adjourn an inquiry or a trial *sine die*. Section 344, Criminal Procedure Code empowers a Court, if there is reasonable cause, to adjourn any inquiry or trial *for such time as it considers reasonable.* Adjourning a case *sine die* cannot be said to be an adjournment for a reasonable time and will be contrary to the provisions of section 344, *Emperor* v. *Rahmatalli*[1]. To postpone a pending case without a date being fixed is illegal, *Kewal Ram* v. *Emperor*[2]. Where the Court adjourns a case *sine die* there is a danger that the matter may be overlooked and the Court loses control of the proceedings, *Tarachand Gehimal* v. *Emperor*[3]. The policy of the criminal law being to bring persons accused of offences to justice as speedily as possible, so that if found guilty they may be punished and if found innocent they should be acquitted, an adjournment *sine die* being in effect an indefinite adjournment is contrary to such policy and is extremely harassing to the accused who should not be left in a state of tension for any length of time.

GIRIJA PRASANNA DEB GUPTA *v.* NIAZ MAHAMMAD KHAN, I.L.R. (1941) 2 CAL. 556.

This case illustrates yet another direction in which the powers of the appellate Court under Order 41, rule 33, Civil Procedure Code, may be exercised. It holds that an appellate Court can award costs of the trial Court in favour of persons who were not parties to the appeal but had been parties to the suit where such costs had been refused to them. The matter is not free from controversy. Judicial opinion is conflicting. Order 41, rule 33 is for the most part taken from Order 58, rule 4 of the Supreme Court Rules. Its object is to empower the appellate Court to do complete justice between the parties. It directs that the power may be exercised in favour of " all or any of the respondents or parties although such respondents or parties may not have filed any appeal or objections." It is obvious that the terms " respondents or parties " do not team together. They are not necessarily antithetic ; nor are they complementary. If " parties " means " parties to the appeal " the word " respondents " will be superfluous. If on the other hand it refers to parties to the

1. (1941) 45 C.W.N. 819. 2. A.I.R. 1926 All. 421.

3. A.I.R. 1932 Sind 214 ; *see also Ramchand* v. *Emperor*, A.I.R. 1929 Sind 115; *Emperor* v. *Dinalshah Rajansha*, A.I.R. 1933 Sind 358.

suit the context does not conduce to such interpretation. In *Rangan Lal* v. *Jhandu*[1], it was stated that the object of Order 41, rule 33 was manifestly to enable the Court to do complete justice between *the parties to the appeal* only and there is nothing in that rule to indicate that relief could be granted to a person who is not before the Court. The same view has been taken in *Rukia* v. *Mewa Lal*[2], though a different opinion was expressed in *Jawahar Bano* v. *Shujaat Hussain*[3] and *Madan Lal* v. *Gajendrapal*[4]. The latest ruling of the Allahabad High Court in *Partap Chand* v. *Chunni Lal*[5], seems to favour the stricter construction and holds that Order 41, rule 33 cannot be extended so as to affect one who was never impleaded in the appeal. In Calcutta, the opinion has been consistently held that a Court can under Order 41, rule 33, pass at any rate an order in *favour* of one who though not a party to the appeal was a party to the suit, in any event where the defence was a common defence, *Dasarath Pal* v. *Brojo Mohan Gaontia*[6], *Bhut Nath Deb* v. *Shasimuki Brahmani*[7], *Abinash Chandra Bidyanidhi Bhattacharya* v. *Dasrath Malo*[8], *Kamalakanta Debnath* v. *Tamijauddin*[9], *Fasal Rahman* v. *Abdul Rashid*[10]. In Madras also it has been uniformly held that the word " party " should be understood as referring to a party to the suit and hence a defendant can get the benefit of the appellate Court's powers notwithstanding an *ex parte* decree made against him, *Thirumalachariar* v. *Athimoola Karayalar*[11]—See also *Krishnaswami Naik* v. *Aiyappa Naik*[12], *Subbarayudu* v. *Papammal*[13], *Mukku Venkataramayya* v. *Mukku Chinniah*[14], *Venkatachella Pillai* v. *Ranga Pillai*[15]. The Rangoon High Court has also held that an appellate Court may vary the decree of the trial Court in favour of a party to the suit who however is not a party to the appeal, *Maung Than Gyaung* v. *Maung Than Hino*[16]. In view of the conflicting judicial pronouncements and the necessity for ensuring to the appellate Court power to do complete justice in the matter without doubt being cast on its competence to exercise the power consequent on ambiguity in the language of the rule, it is highly desirable that the Legislature should intervene and make clear that " parties " in the rule refers to " parties to the suit."

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1. (1911) I.L.R. 34 All. 32.
2. (1928) I.L.R. 51 All. 63.
3. (1920) I.L.R. 43 All. 85.
4. (1929) I.L.R. 51 All. 575.
5. 1940 A.L.J. 161.
6. (1913) 18 C.L.J. 621.
7. (1926) 45 C.L.J. 119.
8. (1928) I.L.R. 56 Cal. 598.
9. (1934) I.L.R. 61 Cal. 919.
10. (1938) 43 C.W.N. 15.
11. (1932) 65 M.L.J. 15.
12. (1914) 1 L.W. 376.
13. (1915) 29 I.C. 579.
14. (1919) 10 L.W. 357.
15. (1914) 28 M.L.J. 334.
16. A.I.R. 1939 Rang. 213.

SUBHKARAN SINGH *v.* KEDAR NATH TEWARI, I.L.R. (1941) ALL. 612.

Whether the Court has power to exclude the testimony of a witness who had been present in Court during the examination of other witnesses in defiance of the Court's order " putting or placing the witnesses under the rule " is a debatable matter. A rescript of Hadrian states that the Judge ought to listen to every admissible kind of evidence and form the best conclusion he could.[1] It is not generally competent to the Court to refuse to examine any of the witnesses produced by the parties, unless the object of summoning a large number of witnesses clearly appears to be to impede the adjudication of the case or otherwise to obstruct the ends of justice.[2] Where collusion among witnesses is apprehended or there is reason to believe that any of them will be influenced, or when required in the interests of justice, the Court may order all the witnesses excepting the one under examination to withdraw, either on application of either party or *proprio motu*, see *Southey* v. *Nash*.[3] In England, the power of ordering out of the Court is discretionary with the Judge and is not a matter of right so far as the parties are concerned, *R.* v. *Murphy*.[4] Even where the Court passes such an order it will not be competent to the Judge to shut out the testimony of a witness who has disobeyed the order.[5] The decisions fully support this view. In *Chandler* v. *Horne*,[6] during the trial of an action for slander, the witnesses were all ordered out of Court but one of the witnesses called for the plaintiff admitted that he had been in Court during the whole case. On the question whether his testimony should be rejected, Erskine, J., observed : " It used to be formerly supposed that it was in the discretion of the Judge, whether the witness should be examined. *It is now settled and acted upon by all the Judges that the Judge has no right to exclude the witness : he may commit him for contempt, but he must be examined* ; and it is then a matter of remark on the value of his testimony that he has wilfully disobeyed the order." Similarly in *Cobbet* v. *Hudson*[7], Lord Campbell, C.J., remarked : " We must be careful that we do not abridge the right conferred on suitors by common or statute law, while we are acting merely on views of policy and expediency with respect to which different Judges may form different opinions.... With respect to ordering the witnesses out of Court, although this is clearly within the power of the Judge and he may fine a witness for disobeying his order, the better opinion seems to have been that *his power is limited to the infliction of the fine* and that *he cannot lawfully refuse to permit the examination of the witness*," see also *Cook* v. *Nethercote*,[8] *Thomas* v. *David*,[9] *Rex* v. *Colley*.[10] Such are the principles of English Law on this matter. In India neither the Evidence Act nor the Codes of Civil or Criminal Procedure contain any rule for ordering witnesses out of Court although the rule is substantially followed as a matter of practice. Section 135 of the Evidence Act merely provides that the order in which witnesses are produced and examined shall be regulated by the law and practice

1. Dig. 22, 5, 3, 2.
2. Woodroffe and Ameer Ali, The Indian Evidence Act, 9th edn., p. 969.
3. (1837) 7 C. and P. 632.
4. (1837) 8 C. and P. 297 at 307.
5. Taylor on Evidence, section 1401.
6. (1842) 2 Moody and Robinson 423 : 62 R.R. 819.
7. (1852) 1 El. and Bl. 11 : 93 R.R. 1.
8. (1835) 6 C. and P. 741 : 40 R.R. 855.
9. (1836) 7 C. and P. 350 : 48 R.R. 794.
10. (1829) 1 Moo. and Mal. 329.

for the time being and in the absence of such law by the discretion of the Court. There is no suggestion that if a witness had stayed in Court during the examination of other witnesses in spite of the Court's order, his testimony can be shut out; nor is there any sound reason to warrant a departure from the English practice. In *Lalmani* v. *Bijai Ram*,[1] Bennet, J., stated: "The universal practice in the Courts in India is . . . that no witness who is to give evidence should be present when the deposition of a previous witness is being taken and a breach of the rule is an abuse of the process of Court and therefore under section 151 of the Civil Procedure Code the Court has inherent power to prevent that abuse and direct that such a witness should not be examined." Stated as a rule, the principle is open to criticism. A witness may not be a material witness or his testimony may bear on an issue to which the testimony of the other witnesses may not have been directed. To refuse permission to examine such a witness because he has disobeyed the order of Court will be without point. Also, ordering out of Court is not made usually where a witness is also a party or in the case of experts while the particular class of evidence starts. The practice as to ordering out of Court is thus admittedly not absolute. That every party to a suit is entitled to have all the witnesses whom he desires to call and is ready at the trial to produce, heard by the Court whatever opinion the Court may form by anticipation as to the probable value of the evidence when it shall be given is well settled, see *Lodloo Singh* v. *Rajendur Laha*,[2] *Shaik Ibhram* v. *Shaik Suleman*.[3] Defiance of the Court's order to stay away can be suitably punished; it can hardly however be a reason why the party should suffer. The view in the instant decision following the English practice is more in harmony with the principles of natural justice than the opinion rendered in *Lalmani* v. *Bijai Ram*.[1]

SHANTI SARUP DAS *v.* ASHARFI SINGH, I.L.R. (1941) ALL. 250 (F.B.).

A simple point, albeit one likely to arise under the Tenancy Acts in the different provinces was the subject of decision in this case which held that the erection of a masonry dwelling house covering one half of an agricultural holding for the benefit of a Panchayati Akhara will not be a work of "improvement" within the meaning of the Agra Tenancy Act, 1926. The test of an improvement seems more or less to be the same under the different Tenancy Acts. Section 3 (11) of the Agra Tenancy Act defines an "improvement" as any work which materially adds to the value of the holding, which is suitable to the holding and is consistent with the purpose for which it was let. Section 3 (4) of the Madras Estates Land Act has virtually the same definition as also section 76 (1) of the Bengal Tenancy Act. Section 3 (3) of the Malabar Compensation for Tenants' Improvements Act, 1900, has also enacted a similar definition. Thus suitability to the holding and consistency with the purpose thereof would form the tests to be applied. The conclusion to be reached on such application will essentially be one of fact only. The Bengal Tenancy Act and the Madras Estates Land Act mention specifically among instances of "improvements" the erection of dwelling houses for the ryot and his family and servants. Section 4 of the Malabar Compensation for

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1. 1934 A.L.J. 750. 2. (1867) 8 W.R. 364.
3. (1884) I.L.R. 9 Bom. 146.

Tenants' Improvements Act declares the "erection of dwelling houses, buildings appurtenant thereto and farm houses" to be works of improvement. Under the Agra Tenancy Act the erection of buildings required for the convenient or profitable use or occupation of the holding is spoken of generally as being an improvement; there is however no advertence in that Act specifically to the erection of buildings to serve as dwellings. Notwithstanding these slightly different enunciations there cannot be much doubt that the erection of a house or other building, *pucca* or *kacha* on the holding will *prima facie* be a work of improvement if it is suitable to the holding and consistent with its purpose, that is to say, if it does not constitute a diversion of the land to an alien purpose. The use for which the building is erected will thus be a relevant factor. The erection of a mantap, for instance, on the holding to serve as a place of worship not for the ryot and his family merely but for the neighbours also will not be justifiable, *Akshay Kumar Shaha* v. *Kamini Kumar Shaha*[1], nor the putting up of a pucca structure to store grain grown elsewhere and to use it as a shop for making profit, *Narayana Gajapati Raju* v. *Jaggayya.*[2] It is equally obvious that the area withdrawn for the erection of the structure will also be a material factor, *Narayana Rao* v. *Zemindar of Muktyala.*[3] The conversion of one forty-eighth of a holding into a building site and raising two pillars to support a structure will be within the scope of the tenant's powers to effect improvements, *Raman Chetty* v. *Arunachalam Chettiar,*[4] *Sankaralinga Moopanar* v. *Subramania Pillai.*[5] Likewise the use of less than one-twentieth of the holding for constructing a building and for housing cattle will be unobjectionable, *Zemindar of Seithur* v. *Dorai Venkataraju.*[6] In *Narayana Gajapati Raju* v. *Jaggayya,*[2] it was held that the erection of a compound wall to prevent the convenient enjoyment of the holding by preventing the trespass of cattle into the field and the putting up of the building on about one fifteenth of the holding for the purpose of storing crops raised on the holding will be "improvements." As pointed out in *Hari Mohan Misser* v. *Surendra Narayan Singh,*[7] the question will really depend on the size of the holding, the area withdrawn from agricultural purposes and the effect of such withdrawal upon the fitness of the holding taken as a whole for profitable cultivation. Where the building does not add to the value of the holding and is unsuitable to it, it certainly cannot constitute an improvement at all, *see Mammad* v. *Veerarayan.*[8] In the instant case about half the area of the holding was divested from agricultural purposes and the building erected was not designed for the use of the ryot or for any purpose associated with the tenancy and on those facts the conclusion was inescapable that the building concerned was not a work of improvement.

EMPEROR *v.* NASIR KHAN, I.L.R. (1941) ALL. 465.

The acceptability of the view taken in this decision, namely, that on the application of the complainant the sentence imposed by the lower Court can be enhanced, will turn on what is to be deemed as the proper objective in punishment for crime, whether it is to be awarded

1. (1934) I.L.R. 62 Cal. 488.
2. (1941) 1 M.L.J. 523.
3. (1928) 54 M.L.J. 621 : I.L.R. 51 Mad. 478.
4. (1914) 29 M.L.J. 724 : I.L.R. 39 Mad. 673.
5. (1915) 29 M.L.J. 514.
6. (1939) 1 M.L.J. 433.
7. (1907) 17 M.L.J. 361 : L.R. 34 I.A. 133 : I.L.R. 34 Cal. 718 (P.C.).
8. 1929 M.W.N. 165.

on the footing that crime is an anti-social act or by way of satisfying the feelings and sentiments of the injured party as well. The view-point in regard to this matter has been gradually shifting and punishment is now seldom regarded as a retribution for the injury inflicted. Judicial opinion on the matter is also divided. At one end it has been held that it is the part of the Crown and not of individuals to ask Courts to enhance sentences passed upon criminal offenders, *Jadunandan Brahman* v. *Emperor*,[1] *Hanuman Prasad* v. *Mathura Prasad*[2]. The reason is that it is essential that the Courts should not be allowed to become tools in the hands of members of the public in giving vent to their private animosities and where those responsible for the maintenance of peace and order in the locality do not feel any dissatisfaction with the sentence awarded there is little reason for any interference by the Courts, *King-Emperor* v. *Som Nath.*[3] In this view it has been held by the Bombay High Court in *Naggi Dula*, In re,[4] that according to any view of the powers of the High Court under the Criminal Procedure Code no private party is entitled to apply to the High Court to enhance a sentence passed by a subordinate Court and that the complainant can only draw the attention of the Government to the sentence leaving it to them whether the matter should be brought up before the higher Court or not. At the other end, it has been held that in proper cases the High Court will on the application of a private person enhance the sentence passed on the accused and it is immaterial through what agency the matter is brought before the Court, whether by the Crown, or by the complainant or *suo motu*, *M. T. Das* v. *E. D. Aboo.*[5] In justification of this conclusion it has been stated that it is not intended by the Criminal Procedure Code that the only remedy of a complainant should be to apply to a District Magistrate to move the Government to apply for an enhancement because the local Government will only apply if the enhancement is desirable in the public interest and not otherwise; whereas the High Court does not regard the question only from the point of view of the public interest but from the circumstances of the particular case before it, *Man Singh* v. *Reoti.*[6] A slightly different position stands revealed in the decisions of the other High Courts. It has been held that though it is not the policy of the High Court to enhance sentences in criminal cases on a petition by a party it is not an invariable rule, *Ata Mohammad* v. *Khanum*,[7] *Bhagolelal* v. *Crown*,[8] *Shankar* v. *Rama.*[9] It is pointed out by the Calcutta High Court that the fact that gratification of private spite should be discouraged is no doubt the reason why that High Court has consistently refused to entertain applications for enhancement at the instance of a private party but that at the same time there is no absolute rule and in a case where there is manifestly a ground for interference beyond all reasonable doubt it matters not if the case comes before the Court at the instance of a private party, *Ali Akabbar* v. *Kasem Ali*,[10] *Pramatha Nath Basu* v. *Ganga Charan Chakravarti.*[11] This line of reasoning is certainly weak, for if the case is so very clear there is no reason to apprehend that the Government will be acting perversely and not

1. (1927) I.L.R. 2 Luck. 805.
2. A.I.R. 1933 Oudh 421.
3. (1938) I.L.R. 14 Luck. 401.
4. (1924) I.L.R. 48 Bom. 358.
5. (1930) I.L.R. 8 Rang. 578.
6. (1930) I.L.R. 53 All. 223.
7. A.I.R. 1938 Lah. 116.
8. I.L.R. (1942) Nag. 208.
9. I.L.R. (1942) Nag. 277.
10. (1929) 33 C.W.N. 605.
11. (1929) I.L.R. 56 Cal. 964.

move in the matter, particularly where its attention has been invited by the complainant to the gross inadequacy of the sentence.

IN THE MATTER OF AN ADVOCATE, I.L.R. (1941) ALL. 592.

In holding that a complaint to the High Court under section 10 (2) of the Indian Bar Councils Act, 1926, alleging acts of criminal misappropriation by an advocate of his client's money should not in the first instance be considered by the Court in the exercise of its disciplinary jurisdiction, that the Court *should summarily reject the complaint* leaving the complainant to prosecute the advocate in a Criminal Court and that only after the guilt of the advocate has been so established a complaint can be made to the High Court for taking action under section 10 (2), it is submitted with respect that the Allahabad High Court has imparted rigour and rigidity into the principle laid down by the Privy Council in *Har Prasad Singh* v. *Judges of the High Court at Allahabad*[1] as to the proper procedure to be adopted in such cases; for which rigidity there seems to be scanty warrant either in the language of the statutory provisions concerned or in the decisions. For instance clause 10 of the Letters Patent (of the Madras High Court) which is the basis for the disciplinary jurisdiction exercised by that High Court empowers it to remove or suspend from practice an advocate on "reasonable cause." The Legal Practitioners' Act, 1879, contains a similar provision in section 13. Section 10 (2) of the Bar Councils Act enacts that upon receipt of a complaint made to it, the High Court, if it does not summarily reject the complaint, may refer the case for inquiry and deal with it on the report submitted. This provision has been construed as meaning that the Court would not be justified generally in dismissing a petition summarily unless it was satisfied that even if the allegations made in the petition be proved there would be no case for taking action, *Ramkrishna Bai* v. *Davar.*[2] There is no countenance anywhere to the view that a summary rejection of the complaint can or ought to be made where the acts alleged against the advocate amount to a charge of an offence committed by him. In *Har Prasad Singh* v. *Judges of the High Court at Allahabad*,[1] the High Court had made an order under clause 8 of the Latters Patent (Allahabad) removing the practitioner from the roll of vakils on charges of misconduct including perjury in connection with a civil suit. In seeking special leave to appeal to the Privy Council, one of the grounds urged was that a criminal prosecution ought to have preceded the inquiry under the disciplinary jurisdiction of the High Court. Adverting to this argument, Lord Macmillan stated: "Their Lordships think it right to add that while they do not take the view that it is incompetent for the High Court to deal under clause 8 of the Letters Patent with charges of a criminal nature against a practitioner unless and until these have been investigated by a Criminal Court they regard it as eminently fitting that in such cases the criminal prosecution should precede any disciplinary action." So stated the rule is elastic. A particular course of action is declared desirable. Non-pursuit of it in the first place is not however to render incompetent the exercise of disciplinary jurisdiction. A summary rejection of the complaint is not compelled. In Calcutta, it has been observed that the *correct procedure* to be followed

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1. (1931) 61 M.L.J. 130 : L.R. 58 I.A. 152 : I.L.R. 53 All. 183 (P.C.).
2. (1932) 34 Bom.L.R. 443.

in cases where what is alleged against the practitioner amounts to a charge of the commission of an offence by him, will be to prosecute him criminally, *Rajendra Kumar Datta*, In the matter of,[1] *Emperor* v. *Satish Chandra Singha*,[2] but that it is by no means an *inflexible rule*, In re *Chandi Charan Mitter, a Pleader*.[3] A trial under the disciplinary jurisdiction of the High Court is summary; trial for a criminal offence will be with a jury and under the normal procedure. In the former case no appeal lies; in the latter case the benefit of a right of appeal exists. If action is taken under the disciplinary jurisdiction the accused can however give evidence in his own behalf; if he is criminally prosecuted he cannot do so. This last advantage available in a summary inquiry is more than off-set by the disadvantages otherwise involved in such a course. Be it as it may, is there adequate justification for summarily rejecting the complaint merely because the complainant has not chosen to prosecute the advocate concerned? It may be that the complainant is not anxious to prosecute but at the same time honestly feels that the practitioner concerned should no longer in the interests of the public practise as an advocate. Nor can it be that failure to prosecute the advocate has the effect of effacing his delinquencies and making him fit to continue in practice. Such being the case, why should the complainant "in all circumstances" be in effect compelled to prosecute by his complaint being summarily thrown out? As observed by Reilly, J., in In re *an Advocate*[4]: "Misconduct which is the subject of inquiry under the Bar Councils Act may often involve the commission of criminal offences. The criminal offence involved may sometimes be of a petty nature, such as trespass or assault, or may be only incidental to the misconduct which is the serious matter alleged against the advocate concerned. In such cases it may often be quite unnecessary to insist that the criminal charge should be disposed of before the advocate's conduct is investigated under the Bar Councils Act. Again the criminal offence alleged against the advocate may be such that he can be prosecuted for it only on the complaint of a private person which has not been made or may be one in respect of which it is obviously appropriate that the complaint should be made by a private person and no such complaint has been made. In either of these cases there may be nothing improper or inappropriate in launching an inquiry into misconduct under the Bar Councils Act, although the criminal charge involved has not been disposed of. But when the advocate is accused of a grave criminal offence for which no private complaint is required, to deal with him under the Bar Councils Act for the misconduct involved in the commission of that offence before he has been tried for the offence appears to be altogether improper." It may be stated with respect that the rule thus laid is more in consonance with the observations of the Privy Council in *Har Prasad's case*[5] than the one to be found in the instant decision.

EMPEROR v. MEHDI ALI, I.L.R. (1941) ALL. 608.

A notable pronouncement on the question of imprisonment awardable in default of fine is to be found in this case. There are

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1. (1926) 30 C.W.N. 186.
2. (1927) I.L.R. 54 Cal. 721.
3. (1920) I.L.R. 47 Cal. 1115.
4. (1931) 61 M.L.J. 148: I.L.R. 54 Mad. 857 (F.B.).
5. (1931) 61 M.L.J. 130: L.R. 58 I.A. 152: I.L.R. 53 All. 183 (P.C.).

two statutory limitations as to the term of imprisonment to be awarded in default of fine. Section 65 of the Penal Code has laid down that the term for which the Court directs the offender to be imprisoned in default of payment of a fine shall not exceed one-fourth of the term of imprisonment which is the maximum fixed for the offence, if the offence be punishable with imprisonment as well as fine. Section 33 (1) (*b*) of the Criminal Procedure Code states that the period shall not exceed one-fourth of the period of imprisonment which the Magistrate is competent to inflict as punishment for the offence otherwise than as imprisonment in default of the payment of the fine. A further limitation is suggested in the decision under notice. It states that it is undesirable to add to a very long term of substantive imprisonment a fine which there is no prospect of the accused by reason of his poverty paying and for default in the paying of which he will have to undergo a further term of imprisonment, particularly where the latter term will bring the sentence of imprisonment to more than the maximum term prescribed for the offence of which he is convicted. To sentence a person to pay a fine where it is clear that he has not got the means of paying is unmeaning. To direct that he should suffer a term of imprisonment in default achieves no real purpose. If the order is enforced it will savour of vindictiveness ; if it is to remain unenforced it will be a *brutem fulmen.* Hence the precept that no fine at all should be awarded in such cases. Where the maximum term of imprisonment prescribed for an offence is not awarded it is only because in the opinion of the Court such a sentence is not called for. If therefore the imprisonment awarded in default of fine when tacked to the substantive punishment, in a case where it is clear that the offender is not in a position to pay the fine, exceeds the maximum imprisonment prescribed for the offence, it will in reality be to belie the reason underlying the award of a lesser term as substantive imprisonment and enable the Court to do indirectly the very thing which it does not deem it desirable to do directly.

DISTRICT BOARD, DEHRA DUN *v.* BABU RAM, I.L.R. (1941) ALL. 276.

This case deals with a question of limitation and holds that a suit by a District Board for realising a certain amount as tax on circumstances and property is not really a suit for recovery of money but for the recovery of a liability under a statute which " obviously " does not fall within articles 37 to 115 of the Limitation Act prescribing three years' limitation but would be governed by article 120. There are no doubt a number of decisions taking the same view. In *President of the Municipal Commission, Guntur* v. *Srikakulapu Padmarazu,*[1] a suit for recovery of profession tax by a municipality under the provisions of the Madras Towns Improvements Act (III of 1871) was held be to governed by article 120. The same period of limitation was held to apply to a suit for the recovery of house and latrine taxes, *Dip Narain* v. *Additional District Magistrate;*[2] to a suit for realising the license fee payable in respect of a platform erected by the defendant, *Mathura Prasad* v. *Special Officer, Gaya Municipality;*[3] to suits for recovery of assessment or revenue, *Antaji Vasudev* v. *Kashinath Dhondo,*[4] *Kasturi Gopala Aiyangar* v. *Anantaram :*[5] to suits by a landholder under the

1. (1881) I.L.R. 3 Mad. 124.
2. A.I.R. 1933 Pat. 65.
3. A.I.R. 1938 Pat. 192.
4. (1904) 6 Bom.L.R. 423.
5. (1902) 13 M.L.J. 248 : I.L.R. 26 Mad. 730.

Madras Local Boards Act against an intermediate landholder for recovery of cess paid, *Kuppuswami Aiyar* v. *Raja Rajeswara Sethupathi,*[1] *Raja of Vizianagaram* v. *Thammanna*[2]and to suits by a former proprietor of an estate for the surplus of sale proceeds which the Collector was bound to pay under section 31 of the Revenue Sales Law Act (XI of 1859), *Secretary of State* v. *Guru Proshad Dur,*[3]. *Bijoy Lal* v.*Nayan Munjari Dassi*[4]. If however the instant decision is to be deemed as according unqualified approval—which it seems to do—to the proposition that wherever a liability is statutory, in the absence of any specific prescription in the statute itself covering the case; it is article 120 of the Limitation Act that must govern a suit for the enforcement of the liability, it is submitted, with respect, that the position is open to criticism. The decision under notice quotes with approval the observation in *Raja of Vizianagaram* v. *Thammanna,*[2] at page 503 : " We see no warrant for applying the three years' rule. The suit is not one for rent, nor is it based on any contract express or implied. It is to enforce a statutory liability created by statute." The Full Bench had added " In such a case the course of decisions in this Presidency has been to the effect that the suit will be governed by article 120." Two remarks fall to be made. In the first place most of the decisions applying article 120 to cases of taxes and assessments sought to be recovered have merely so assumed, or proceeded on the footing that in the particular cases there has been no other article of the Limitation Act governing the facts of such a case and not on the ground that because the liability is statutory the case cannot be fitted into the other articles, whatever the facts of the particular case may be, even if that can be compassed without any perceptible jolt. Secondly, even in Madras, it has been pointed out that the application of article 120 indiscriminately to every case of enforcement of a statutory liability will not be justified. Thus in *Muthuramalinga Sethupathi* v. *Mahalinga Raju,*[5] Seshagiri Aiyar, J., observed : " I am unable to see why a statutory liability should not bring a claim under the specific articles if otherwise the words are capable of covering it." This view seems to be inferentially approved in later decisions in Bombay and Patna. In *Abasbhai* v. *Bhimji,*[6] in regard to a suit by a tenant for recovery back of a premium which by section 8 (2) of the Bombay Rent Act had been declared to be a liability repayable and as such would be a statutory liability, it was held that article 62 and not 120 that would apply. Beaumont, C.J., remarked : " It is no doubt true that a statute gave the defendant the right to recover the money, but it seems to me that once money is paid over by the defendant to the plaintiff in such circumstances that it is immediately repayable it matters not whether the right to repayment arises under some statute or because of some rule of law or of equity . . . . If a case falls clearly within the words of article 62 effect must be given to such article." On the same footing, in *Ramparikha Pandey* v. *Mt. Ranjhari Kuer*[7], a claim to enforce a statutory obligation under section 55 of the Transfer of Property Act was held to be governed by article 111 of the Limitation Act. It would thus seem that the scope of the decision under notice should be understood as not transcending its special facts.

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1. (1925) 49 M.L.J. 462. 2. (1937) 1 M.L.J. 91 : I.L.R. (1937) Mad. 498 (F.B.).
3. (1892) I.L.R. 20 Cal. 51 at 57 (F.B.). 4. (1919) I.L.R. 47 Cal. 331.
5. (1917) 33 M.L.J. 379. 6. (1931) 33 Bom.L.R. 1563.
7. (1936) I.L.R. 15 Pat. 753.

JNAN CHANDRA MUKHERJI *v.* MANO RANJAN MITRA, I.L.R. (1941) 2 Cal. 576.

This case deals with a point on which there is a divergence of judicial opinion. It holds that a payment of interest as such by a principal will not save limitation against the surety. This view of the law does not seem to be sound. Principals and sureties are according to all decisions not to be regarded as joint contractors and are as such outside section 21 of the Limitation Act. The surety's liability is co-extensive with that of the principal debtor unless otherwise provided in the contract (section 128, Contract Act). 'Co-extensive' means in the same degree in all directions and *prima facie* covers both *quantum* as well as *time*. The contract itself is in terms to discharge the liability of the principal (section 126, Contract Act). No doubt the principal's liability arises on the loan while that of the surety on his default only, but the debt is the same and identical as regards both of them. There cannot be two distinct debts ; otherwise payments on account of principal or interest by the principal debtor would not *ipso facto* reduce the debt due by the surety and *vice versa* as they do. It is true that the surety's liability does not necessarily in all cases spring into existence simultaneously with that of the principal, but that will not mean that his liability despite originating in the same transaction is distinct in the sense that the debts of the principal and the surety are distinct for purposes of the application of section 20 of the Limitation Act, and the opinion to that effect underlying *Brajendra Kishore Roy Chowdhury* v. *The Hindusthan Co-operative Insurance Society,Ltd.*[1], *Charu Chandra Bandopadhaya* v. *Faithful*[2], *Gopal Daji* v. *Gopal Bin Sonu*[3], *Raghavendra Gururao* v. *Mahipat Krishna*[4], *Srinivasa Varadachariar* v. *Echammal*[5], *Govindaraja Mudali* v. *Samarapuri Chettiar*[6], *Vaiyapuri Pandaram* v. *Seetharama Chettiar*[7], *Seth Abde Ali* v. *Askaran*[8], *U Ba Pe* v. *Ma Lay*[9], *Dialu Mal* v. *Nandu Shah-Jai Lal*[10] seems to be erroneous. The proper view would appear to be that in cases of principal and surety there are two contracts in respect however of *one debt* common to both, see *Ranjit Ray* v. *Kisori Mohan Gupta*[11]. Section 20 of the Limitation Act provides that where interest on a debt is before the expiration of the prescribed period paid as such by the person liable to pay the debt or by his agent duly authorised in this behalf . . . a fresh period of limitation shall be computed from the time when the payment was made. Computed as regards what ? Obviously it can only be in regard to the *common debt* of the principal and the surety. There is nothing in the section restricting the benefit accruing to the creditor with respect to the amount due to him to his remedy against the person paying alone ; the debt being kept alive the result must be to make it enforceable against any one liable for it, *Domi Lal Sahu* v.*Roshan Dobay*[12], *Velayudham Pillai* v. *Vaithialingam Pillai*[13], *Harbans Lal* v. *Nathu*[14], *Ranjit Ray* v. *Kisori Mohan Gupta*[11]. There is considerable force in the observation of Fry, L.J., in In re *Frisby: Allison* v. *Frisby*[15], that as it is

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1. (1917) I.L.R. 44 Cal. 978.
2. (1919) 53 I.C. 999 (Cal.).
3. (1903) I.L.R. 28 Bom. 248.
4. (1924) I.L.R. 49 Bom. 202, 206.
5. (1910) 21 M.L.J. 455.
6. A.I.R. 1930 Mad. 112 (2).
7. (1933) 40 L.W. 479.
8. A.I.R. 1924 Nag. 411.
9. (1932) I.L.R. 10 Rang. 398.
10. (1931) I.L.R. 13 Lah. 240, 248.
11. I.L.R. (1940) 2 Cal. 362.
12. (1906) I.L.R. 33 Cal. 1278.
13. (1912) 24 M.L.J. 66.
14. (1913) 53 I.C. 586 (Lah.).
15. (1889) 43 Ch.D. 106, 108.

the practice for the principal debtor and not the surety to pay the interest "it would be contrary to good sense and common understanding of mankind that while he is doing so the statute should run in favour of the surety unless he makes a payment or gives an acknowledgment." Also in the scheme of the Limitation Act, whenever the Legislature intended that a fresh period of limitation is to operate against certain persons only, it has said so in distinct terms—*see* section 18. There is nothing in the language of section 20 to indicate that the extension is only to operate against the person making the payment, *Domi Lal Sahu* v. *Roshan Dobay*[1]. It is indeed difficult to see why on principle a payment by one of several persons liable under the same transaction should not operate to extend limitation against them all in the case of a principal and surety inasmuch as section 21 does not expressly exclude such a case. For these reasons the view taken in *Ranjit Ray* v. *Kisori Mohan Gupta*[2] seems to be preferable to the one adopted in the instant decision.

EMPEROR *v.* GHURA, I.L.R. (1941) All. 912.

"Oh, the little more, and how much it is!

And the little less, and what worlds away."

So said Robert Browning whose words were quoted by Darling, J., in *Rex* v. *Marks Feigenbaum*[3] in pointing out the momentous and altogether contrary conclusions likely to be suggested by the silence of an accused after being informed about the statements made by others implicating him in the commission of an offence according as it is taken as supplying or not just that amount of corroboration that may be needed. According to the English Law no presumption arises *ipso facto* from the silence of an accused but non-denial cannot always be ignored. Silence when charged by the police after being cautioned that he need not say anything in answer to the charge unless he wished to do so will not amount to corroboration, *Rex* v. *Job Whitehead*[4]. That however stands on a special footing, see *Rex* v. *Tate*[5]. According to the report of the judgment in the case as found in the Law Times, Lord Alverstone, C J., seems to have observed: "The non-denial of the offence by the prisoner when formally charged by the police is not corroboration." The judgment of the learned Chief Justice as set out in the official reports that "it may be that in some cases the absence of an indignant repudiation of a charge might be some corroboration" has therefore to be understood as covering cases of the accused's silence when questioned by persons other than the police or without the administering of the warning that he need not say anything unless he wished to do so and that if he said anything it might be used in evidence against him. The view expressed by Darling, J., in *Rex* v. *Marks Feigenbaum*[3], that "the failure of the appellant to make any reply to the statement of the police officer might, having regard to the nature of the statement and to the circumstances in which it was made, be considered as a corroboration" of the other

1. (1906) I.L.R. 33 Cal. 1278.
2. I L.R. (1940) 2 Cal. 362.
3. (1919) 1 K.B. 431.
4. (1929) 1 K.B. 99.
5. (1908) 2 K.B. 680: 99 L.T. 620.

evidence does not seem to have noticed the qualification in the judgment of Lord Alverstone, C.J., in *Rex* v. *Tate*[1] as reported in the Law Times and in any event stands opposed by the opinion expressed by Lord Hewart, C.J., in the later ruling in *Rex* v. *Job Whitehead*[2]. The latest English ruling on the point *R.* v. *Keeling*[3] follows this last decision and holds that silence cannot amount to corroboration. It is thus clear that *R.* v. *Feigenbaum*[4] is out of line with later decisions. No doubt it has not been stated anywhere definitely that *Feigenbaum's case*[4] is no longer of any authority but it is apparent that *Whitehead's case*[2] is treated as laying down the better view of the law on the matter, see *R.* v. *Charavanamuthu*[5], *R.* v. *Naylor*[6]. In any event as stated by Lord Roche in *Stephen Seniviratne* v. *The King*[7] to arrive at an adverse verdict on the strength of opinions formed as to the conduct of the accused is . . . to act upon the merest scintilla of evidence and to be impermissible." According to Tindal, C.J., "The proof of the case against a prisoner must depend for its support not upon the absence or want of any explanation on the part of the prisoner himself but upon the positive affirmative evidence of his guilt that is given by the Crown. It is not, however, an unreasonable thing and it daily occurs in investigations . . . . that if there is a certain appearance made out against a party, if he is involved by the evidence in a state of considerable suspicion, he is called upon for his own sake and his own safety to state and to bring forward the circumstances whatever they may be, which might reconcile such suspicious appearances with perfect innocence," *Regina* v. *Frost.*[8] Thus according to the English decisions, *firstly*, silence when charged by the police cannot give rise to any adverse inference against the accused; *secondly*, to draw an adverse verdict on the strength of opinions formed as to the conduct of the accused is impermissible; *lastly*, where the evidence in the case involves the accused in "a state of considerable suspicion" it will be in his own interest to mention the circumstances which might reconcile the suspicious appearances with his innocence. In India, section 106 of the Evidence Act lays down that when any fact is specially within the knowledge of any person the burden of proving that fact is upon him and illustration (*h*) to section 114 provides that when a person refuses to answer a question which he is not compelled to answer by law it may be presumed that the answer, if given, would be unfavourable to him. These rules cannot however be read as casting any burden on an accused person to show that no crime was committed by proving facts specially within his knowledge nor will they warrant the conclusion that if anything is unexplained which the Court feels the accused could explain he should be found guilty, *King-Emperor* v. *Damapala*[9]. It is one thing to say that the rules cannot cast any burden on the accused,

1. (1908) 2 K.B. 680: 99 L.T. 620.
2. (1929) 1 K.B. 99.
3. (1942) 1 All. E.R. 507.
4. (1919) 1 K.B. 431.
5. (1930) 22 Cr. App. Rep. 1.
6. (1933) 1 K.B 685.
7. (1936) 41 C.W.N. 65 (P.C.).
8. (1839) 4 St. Tr. N.S. 85, 443.
9. (1936) I.L.R. 14 Rang. 666 (F.B.).

nor suggest any inference as to his guilt as flowing out of his silence *per se*, but it will be a different thing to claim that silence can never be taken into account against the accused. Section 342, Criminal Procedure Code, states in terms that for the purpose of enabling the accused to explain any circumstances appearing in the evidence against him, the Court may at any stage of any inquiry or trial without previously warning the accused put such questions to him as it considers necessary and that the Court may draw such inference as it thinks just from his refusal to answer such questions. It may be that in some cases the Court may draw even an inference against the accused from his refusal to answer—a risk which the accused has to face if he remains immured in silence, see *Emperor* v, *Dwijendra Chandra Mukerjee*[1], *Amrita Lal Hazra* v. *Emperor*[2], *Sher Jang* v. *Emperor*[3], *Tahsizuddin Ahmad* v. *Emperor*[4]. No hard and fast rule can be laid down but care must be taken in all cases not to put too high an adverse value on such silence, *King-Emperor* v. *Damapala*[5]. The Indian Law must in view of the statutory provisions referred to *supra* be taken to be less favourable to the accused on this matter than the English Law, but as indicated in the instant decision the fact of silence of the accused may no doubt in a proper case be taken into account with all the other circumstances of the case, remembering however all the while that an accused person has always a right to remain silent if he wishes and that his silence must never be allowed in any degree to become a substitute for proof by the prosecution of its case.

SURAJ KUER *v.* SANT SINGH, I.L.R. (1941) All. 418.

This decision holds that a Court has no jurisdiction to demand from a plaintiff security for costs on grounds not provided for in Order 25, rule 1 of the Civil Procedure Code and therefore an order demanding such security cannot be justified even if the Court is satisfied that the plaintiff is conducting a litigation really for another. On a matter seemingly so simple, it is remarkable that there has been a conflict of judicial opinion regarding the powers of the Court. The Civil Procedure Code of 1859 contained no provisions governing security for costs to be taken from a plaintiff. Such provisions came into existence only later. Prior to that time the English practice on the point was being followed in India, see *Chunder Cant Mookerjee* v. *Ram Coomar Coondoo*[6], *Ram Coomar Coondoo* v. *Chunder Cant Mookerjee*[7]. According to that practice it was competent to the Court to demand security for costs from the plaintiff where it was clear that he was not the real litigant but was only a puppet in the hands of others. Thus in *Cowell* v. *Taylor*[8], Bowen, L.J., observed, "that in order to prevent abuse, if an insolvent sues as a nominal plaintiff for the benefit of somebody else he must give security." Following the English practice, in *Ram Coomar Coondoo's case*[7], Sir Montague Smith

1. (1915) 19 C.W.N. 1043.
2. (1915) I.L.R 42 Cal. 957.
3. A.I.R. 1931 Lah. 178.
4. A.I.R. 1940 Cal. 250.
5. (1936) I.L.R. 14 Rang. 666 (F.B.).
6. (1874) 22 W.R. 138.
7. (1876) I.L R. 2 Cal. 233.
8. (1885) 31 Ch. D. 34.

remarked that where it appears that the plaintiff in a suit is in fact suing on behalf of another person who is not a party to the record, the *ordinary practice* is to require security for costs. The question is whether in view of the specific provisions in the Civil Procedure Code, subsequent to the Code of 1859, the English practice can still be followed. It is true as observed by Lord Davey in *Gokul Mandur* v. *Pudmanund Singh*[1], the essence of a Code is to be exhaustive on the matters in respect of which it declares the law and it is not the province of a Judge to disregard or go outside the letter of the enactment according to its true construction. Order 25 is headed "security for costs" and the marginal note to rule 1 reads "when security for costs may be required from plaintiff." The rule does not however contain any language suggesting an exhaustive enumeration of cases when security may be ordered. Where a particular right is allowed or relief permitted under certain circumstances only or on certain grounds alone and in no other case it has generally been so stated, [*see* section 101 (second appeals) section 104 (orders from which an appeal lies), Order 20, rule 3 (additions and alterations in judgments after being signed)]. Where no such limitation is to be found the provision of law concerned is not ordinarily considered to be exhaustive and as precluding the exercise of its inherent powers by the Court [*see* section 11 (*res judicata*), section 144 (restitution), Order 21, rule 92 (setting aside or confirming execution sales), Order 41, rule 20 (addition and transposition of parties), Order 41, rule 23 (remand), etc.]. The language of Order 41, rule 10 empowering an appellate Court to require an appellant to furnish security for costs is also significant in this connection. Under this last provision while in the specified cases security for costs shall be ordered, in other cases the matter is left entirely to the discretion of the Court, thereby indicating that the enumeration is merely to guide the Court as to the cases where according to the Legislature security shall be ordered, leaving cases outside the enumerated categories to be dealt with by the Court according to the special circumstances of such cases. *Prima facie* therefore there is no reason to read O. 25, r. 1 as exhaustive of the grounds on which the plaintiff can be directed to give security for costs. Nor will it be permissible to invoke the maxim *expressio unius est exclusio alterius*. An expression of an affirmative cannot be read as a negation of what is not affirmed except where it follows as a necessary or reasonable implication from the language of the statute. As stated by Woodroffe, J., in *Hukum Chund Boid* v. *Kamalanund*[2], the Civil Procedure Code does not provide for all cases and it does not affect the previously existing powers of the Court except where they are expressly taken away, see also *Durga Dihal Das* v. *Anoraji*[3]. Turning to the decisions, in Calcutta, Bombay, Sind and Madras it has been held that a Court has power to require security for costs, for instance, where it finds that a person who has an interest in having a question decided puts forward another to have it tried in a suit in that other's name, in

1. (1902) L. R 29 I.A. 196: I.L.R. 29 Cal. 707 (P.C.).
2. (1906) I.L.R. 33 Cal. 927, 931.
3. (1895) I.L.R. 17 All, 29.

other words, where the plaintiff is not the real litigant, *Ram Coomar Coondoo* v. *Chunder Cant Mookerjee*[1], *Khajah Assenoollajoo* v. *Solomon*[2], *Hari Nath Singh* v. *Ram Kumar Bagchi*[3], *Bomanji* v. *Nusserwanji*[4], *Chainrai Valiram* v. *The Sunday Times*[5], *Ramasami Pillai* v. *Krishnammal*[6]. It is true that in *Bhairabendra Narain Deb* v. *Udai Narain Deb*[7], Cuming, J., has observed: "Had the Code been entirely silent on the point, then possibly the inherent power of the Court might have been invoked, but when the Code does make certain provisions for the taking of security for costs from the plaintiff it seems . . . . . that in those cases and those cases only may costs be taken from the plaintiff and that for security for costs to be demanded from the plaintiff the case must fall within the purview of Order 25, rule 1." This statement runs counter to the precedents in Calcutta and elsewhere. Also as pointed out in *Chainrai Valiram's case*[5], it loses sight of the fact that merely because the Legislature has provided for security being ordered in certain specified cases it cannot be said that the Legislature has thereby intended to deprive the Court of its inherent jurisdiction to act *ex debito justitiae* and make similar orders in cases not specifically provided for. These reasons suggest that the view taken in the decision under notice regarding the scope of Order 25, rule 1 may require further and fuller consideration.

OUSHADESWARA SWAMI TEMPLE *v.* SAMIAPPA MUDALIAR, (1942) 1 M.L.J. 99.

This decision holds that a trustee is not debarred from purchasing property which was once trust property but had become lost to the trust by adverse possession before he became a trustee. Section 3 of the Trusts Act states that whatever validly formed the subject-matter of the trust is trust property. The test as between the trustee and the beneficiary of trust property is thus whether the property concerned was in fact the subject-matter of the trust at the time of its creation. There is nothing in the section to suggest that if any item was lost to the trust at any time subsequently it would for all purposes cease to be trust property. Section 13 prescribes that the trustee should take such steps as may be reasonably requisite for the assertion or protection of the title to trust property and according to section 14 a trustee must not "aid" any title to the trust property adverse to the interests of the beneficiary. It will be a question of some nicety whether the recognition by a trustee of property as having ceased to be trust property through the accrual of a prescriptive title thereto in favour of his vendor, and his purchasing such property will not be tantamount to "aiding" by the trustee of an adverse title within the meaning of

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1. (1876) L.R. 4 I.A. 23: I.L.R. 2 Cal. 233 (P.C.).
2. (1887) I.L.R. 14 Cal. 533.
3. (1913) 18 C.W N. 119.
4. (1902) I.L.R. 27 Bom. 100.
5. A.I.R. 1932 Sind 33.
6. (1935) 69 M.L.J. 38.
7. (1923) I.L.R. 50 Cal. 853.

section 14. In *Bennet* v. *Burgis*[1], where after a part of the trust property had been lost a suit was brought for the appointment of new trustees in regard to the remainder, Sir James Wigram, V.C., held that the new trustees should in any event be trustees of *the whole of the properties comprised in the settlement* and that to afford them protection an inquiry should be directed to ascertain what part of the properties had been lost and whether any steps ought to be taken for the recovery of such property. The order proposed suggests that though for purposes of accountability and administration the property lost could be counted out yet the relationship between the parties for other purposes would be that of trustee and *cestui que trust* not in regard to the properties that were still with the trust merely but in regard to the entirety of the properties that formed the subject of the settlement, subject however to what had been carried off by alienations within the competency of the trustee. The distinction drawn between a trustee and a stranger in regard to purchase of trust property (*see* section 65) strengthens this conclusion. It is the status of the person as trustee at the moment of purchase that leads to the avoidance of the conveyance of trust property either directly to himself or indirectly by a conveyance to a third person having no notice of the trust in the first instance and a repurchase of the property subsequently from him. The ruling in *Boles and British Land Co.'s Contract*, In re[2], that the mere fact that a man has once been a trustee twelve years before the sale is no reason why he should not purchase the property, is perfectly consistent with this principle. The person having shed his character as trustee long before the transaction, he was no longer a person under disability. Likewise the observation of Lord Hobhouse in *Clark* v. *Clark*[3] that "their Lordships cannot agree that a sale is to be avoided, merely because when entered upon the purchaser may, at his option, become the trustee of the property purchased" in no way affects the test suggested. The deciding factor then is not whether the purchaser in fact was, or was likely to become a trustee under the settlement at any time, but whether he had that status when he bought the property covered by the trust instrument. If therefore the conclusions, that whatever formed the subject-matter of the trust always remained trust property between the trustee and the *cestui que trust*, except perhaps in respect of accountability, notwithstanding that it or a portion of it had been lost to the trust, and that it is the status of the purchaser as trustee at the time of his purchase of trust property which invalidates the purchase, are correct, the fact that in the instant case the trust property had been lost to the trust through the negligence of the previous trustees permitting the accrual of a title by prescription in favour of the vendor will not render the property any the less trust property with reference to the trustee invalidating a purchase thereof by him while still retaining the character of a trustee.

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1. (1846) 5 Hare 295: 67 E.R. 925.
2. (1902) 1 Ch. 244.
3. (1884) 9 App. Cas. 733.

KANAGAVELU NADAR *v.* SUBBIER, (1942) 1 M.L.J. 353.

A point, almost one of first impression, was decided in this case, when it was held that the principle of section 62 of the Indian Trust Act would be applicable to the case of public religious trusts as well. Section 62 provides that where at the instance of the beneficiary any property wrongfully alienated by the trustee to himself or another is recovered the beneficiary must repay the purchase money paid with interest. The English rule is similar. The *cestui que trust* can have the property reconveyed to him on the one hand repaying the price at which the trustee bought with interest at 4 per cent. and the trustee or purchaser on the other accounting for the profits of the estate, Lewin on Trusts (14th edn.), pp. 832, 833, *Hall* v. *Hallet*[1], *York Buildings Co.* v. *Mackenzie*[2], Ex parte *James*[3], *Watson* v. *Toone*[4]. The reason behind the rule is universal and not special, namely, that there should be no "unjust enrichment". In English law, except under an express power trustees of charities could not, as a general rule, even before the restrictions imposed by the Charitable Trusts Acts, make an absolute disposition of the charity estate. Where a deed of transfer is cancelled by the Court the parties are put in exactly the same situation as if no such deed had ever been executed; *Hoghton* v. *Hoghton*[5]. It would therefore follow that any benefit had by the charity will have to be refunded if the alienated property is to be recovered. The question never turned on whether the alienation was void or voidable but whether an institution specially protected by the equitable jurisdiction of the courts can retain a benefit in a manner which equity cannot approve of. In *Attorney-General* v. *Kerr*[6]. in setting aside certain leases and a conveyance of the fee simple in certain charity properties, the Master of the Rolls directed compensation for improvements to be paid and stated "The charity having equity done, it must certainly do equity". It is well settled in English law that in the absence of collusion or fraud the Court may on setting aside a sale of charity property direct that an allowance should be made in respect of buildings or other permanent improvements erected or made upon the land. In *Attorney-General* v. *Magdalen College*[7] in setting aside an alienation of charity property, the Master of the Rolls ordered: "I shall accordingly declare the conveyance to be void and direct it to be delivered up and cancelled"; and added that an account should be taken of the rents and profits since the filing of the suit directing "all just allowances." The principle of these decisions by which compensation for improvements and "all just allowances" are permitted would equally extend to the refunding of the purchase money and the argument is quite legitimate that the charity cannot at the same time retain the benefit received and yet get back the property forming the consideration therefor.

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1. (1784) 1 Cox. 134, 139: 29 E.R. 1096.
2. (1795) 8 Bro. P. C. 42.
3. (1803) 8 Ves. 337, 351: 32 E. R. 385.
4. (1820) 6 Madd. 153: 56 E.R. 1050.
5. (1852) 15 Beav. 278: 51 E.R. 545.
6. (1840) 6 L. J. Ch. 190.
7. (1854) 18 Beav. 223: 52 E.R. 88.